DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-6549
Title: Billy Joe Reynolds, Petitioner
v.
United States
Docketed: September 20, 2010
Lower Ct: United States Court of Appeals for the Third Circuit
Case Nos.: (08-4747)
Decision Date: May 14, 2010
Rehearing Denied: June 16, 2010
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Sep 14 2010	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due October 20, 2010)
Oct 14 2010	Order extending time to file response to petition to and including November 19, 2010.
Nov 19 2010	Brief of respondent United States in opposition filed.
Dec 1 2010	Reply of petitioner Billy Joe Reynolds filed. (Distributed)
Dec 2 2010	DISTRIBUTED for Conference of January 7, 2011.
Jan 10 2011	DISTRIBUTED for Conference of January 14, 2011.
Jan 12 2011	Letter of January 12, 2011, from Acting Solicitor General received. (Distributed)
Jan 13 2011	Letter of January 13, 2011, from counsel for the petitioner in response received. (Distributed)
Jan 18 2011	DISTRIBUTED for Conference of January 21, 2011.
Jan 24 2011	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED limited to Question I presented by the petition for a writ of certiorari.
Feb 10 2011	The time to file the joint appendix and petitioner's brief on the merits is extended to and including May 9, 2011.
Feb 10 2011	The time to file respondent's brief on the merits is extended to and including June 23, 2011.
May 6 2011	The time to file the joint appendix and petitioner's brief on the merits is further extended to and including May 12, 2011.
May 12 2011	Joint appendix filed. (Statement of costs filed)
May 12 2011	Brief of petitioner Billy Joe Reynolds filed.
Jun 23 2011	Brief of respondent United States filed.
Jul 15 2011	CIRCULATED
Jul 17 2011	Record from U.S.C.A. for 3rd Circuit is electronic.

Jul 19 2011	SET FOR ARGUMENT ON Monday, October 3, 2011.
Jul 25 2011	Reply of petitioner Billy Joe Reynolds filed. (Distributed)
Aug 23 2011	Record from U.S.D.C. for Western District of Pennsylvania is electronic.
Oct 3 2011	Argued. For petitioner: Candace Cain, Assistant Federal Public Defender, Pittsburgh, Pa. For respondent: Melissa Arbus Sheryy, Assistant to the Solicitor General, Department of Justice, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

No.
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER 2009 TERM

BILLY JOE REYNOLDS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, Billy Joe Reynolds, pursuant to Title 18, United States Code, Section 3006A(d)(6) and Rule 39 of the United States Supreme Court, asks leave to file the attached Petition for Writ of Certiorari without prepayment of costs, and to proceed in forma pauperis. Pursuant to an appointment under the Criminal Justice Act of 1964, as amended, the Federal Public Defender's Office was appointed to represent the Petitioner in the United States District Court for the Western District of Pennsylvania and in the United States Court of Appeals for the Third Circuit.

DATED: September 14, 2010

Respectfully submitted,

LISA B. FREELAND
Federal Public Defender

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Assistant Federal Public Defender
Counsel for Petitioner,
Billy Joe Reynolds
1500 Liberty Center
1001 Liberty Avenue
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412-644-6565

No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER 2009 TERM

BILLY JOE REYNOLDS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

LISA B. FREELAND
Federal Public Defender

CANDACE CAIN
Assistant Federal Public Defender
Counsel for Petitioner,
Billy Joe Reynolds

1500 Liberty Center
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QUESTIONS PRESENTED

I. DOES MR. REYNOLDS HAVE STANDING UNDER THE PLAIN READING OF THE S.O.R.N.A. STATUTE TO RAISE CLAIMS CONCERNING THE ATTORNEY GENERAL'S INTERIM RULE AND IS REVIEW BY THIS COURT IS NEEDED TO RESOLVE THE CIRCUIT CONFLICT?

II. DOES S.O.R.N.A. VIOLATE THE CONSTITUTION AND SHOULD THIS COURT HEAR BILLY JOE REYNOLDS' CASE TO RESOLVE CONFLICTING COURT OPINIONS CONCERNING THE COMMERCE CLAUSE, THE EX POST FACTO CLAUSE AND DUE PROCESS?

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The non-precedential opinion of the United States Court of Appeals for the Third Circuit was filed on May 14, 2010 at Appeal No. 08-4747 and is attached to this petition at Appendix 1a.

The Third Circuit filed an order denying Mr. Reynold's petition for rehearing en banc on June 16, 2010 at Appeal No. 08-4747. A copy of the order is attached to this petition at Appendix 2a.

The district court's judgment of sentence at was entered at Criminal No. 07-412 in the Western District of Pennsylvania on November 24, 2008. App. 4-8, 16.[1]

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[1] The Appendix filed in the United States Court of Appeals for the Third Circuit is cited as "App." followed by the page number. The presentence report is cited as "PSR" followed by the paragraph or page number.

STATEMENT OF JURISDICTION

A writ of certiorari is sought from a non-precedential opinion of the United States Court of Appeals for the Third Circuit filed on May 14, 2010 affirming the judgment of the District Court. (Appendix 1a herein, page 2).

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1) which grants the United States Supreme Court jurisdiction to review by writ of certiorari all final judgments of the courts of appeals.

The time for filing a Petition for Writ of Certiorari began to run on June 16, 2010, when the Third Circuit filed its order denying Mr. Reynold's petition for rehearing en banc. (Appendix 2a herein).

The due date for filing this Petition for Writ of Certiorari is September 14, 2010.

STATUTORY PROVISIONS INVOLVED

Administrative Procedures Act, in pertinent part:

5 U.S.C. § 553. Rule making

* * *

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include -

(1) a statement of the time, place, and nature of the public rule making proceedings;
(2) reference to the legal authority under which the rule is proposed; and
(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply -

* * *

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

* * *

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except -

* * *

(3) as otherwise provided by the agency for good cause found and published with the rule.

5 U.S.C. §§ 553(b)(3)(B) and (d)(3).

Sex Offender Registration and Notification Act (SORNA), in pertinent part:

CHAPTER I - CHILD PROTECTION AND SAFETY

SUBCHAPTER I - SEX OFFENDER REGISTRATION AND NOTIFICATION

* * *

Part A - Sex Offender Registration and Notification

* * *

42 U.S.C. § 16913. Registry requirements for sex offenders

(a) In general

A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

(b) Initial registration

The sex offender shall initially register -

(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or

(2) not later than 3 business dates after being sentence for that offense, if the sex offender is not sentenced to a term of imprisonment.

(c) Keeping the registration current

A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) of this section and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.

(d) Initial registration of sex offenders unable to comply with subsection (b) of this section

The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before July 27, 2006 or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section.

(e) State penalty for failure to comply

Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter.

42 U.S.C. §§ 16913(a)-(e).

STATEMENT OF THE CASE

A. S.O.R.N.A. Indictment and Motion to Dismiss:

A grand jury in the United States District Court for the Western District of Pennsylvania returned an indictment charging appellant, Billy Joe Reynolds, with one count of violating 18 U.S.C. § 2250(a), alleging that:

> Between on or about September 16, 2007, and on or about October 16, 2007, in the Western District of Pennsylvania, the defendant, BILLY JOE REYNOLDS, who was required to register under the Sex Offender Registration and Notification Act after having been convicted in 2001 in...[Missouri]...of the felony sex offense of Statutory Sodomy in the 2nd Degree, traveled in interstate commerce and knowingly failed to register and update a registration as required by the Sex Offender Registration and Notification Act.

App. 20.

Mr. Reynolds moved to dismiss the indictment on constitutional and other grounds and filed a brief in support. App. 21-57. The Government responded. App. 58-114. After a status conference and consideration of written arguments the district court denied Mr. Reynolds' motion to dismiss. App. 1-3, 114-118.

B. Conditional Plea of Guilt and Sentencing:

Mr. Reynolds then entered a conditional plea of guilt to the indictment pursuant to a plea agreement. App. 119-145. The district court later sentenced Mr. Reynolds to 18 months imprisonment and three years supervised release. App. 4-8. The

court imposed a special assessment in the amount of $100.00. App. 4, 16.

Judgment was entered November 24, 2008. App. 4-8, 16. A timely notice of appeal was filed on December 8, 2008. App. 9, 17.

C. **Proceedings on Direct Appeal**:

Mr. Reynolds raised the following issues in the Court of Appeals:

I. THE INDICTMENT AGAINST BILLY JOE REYNOLDS FOR VIOLATION OF CRIMINAL AND NATIONWIDE REGISTRATION PROVISIONS OF TITLE I OF THE ADAM WALSH ACT, OR "SORNA," SHOULD HAVE BEEN DISMISSED AS UNCONSTITUTIONAL, BOTH FACIALLY AND AS APPLIED TO HIM, AND AS A VIOLATION OF FEDERAL LAW.

A. Congress Improperly Delegated to the Attorney General the Decision Whether SORNA Would Apply Retroactively to Those Like Mr. Reynolds Who Were Convicted Before July 27, 2006, Before SORNA Was Implemented, which Violated the Non-Delegation Doctrine in Article I, Sections 1 and 8 of the United States Constitution.

B. The District Court erred in upholding SORNA as a proper exercise of Congressional Authority under the Commerce Clause.

C. If SORNA Applied to Mr. Reynolds, It Violated the Ex Post Facto Clause and is Unconstitutional.

D. SORNA is Unconstitutional and its Application Violated Mr. Reynolds' Due Process Rights Because: 1) SORNA Has Not Been Implemented and There is No Duty to Register; and 2) Mr. Reynolds Never Received Notice of His Duty to Register Under SORNA and, Therefore, Did Not Knowingly Fail to Register.

1. SORNA Has Not Been Implemented and Thus There Was No Duty, and Is No Duty, Under SORNA For Mr. Reynolds To Register.

2. Mr. Reynolds Never Received Notice of His Duty to Register Under SORNA and Therefore Did Not Knowingly Fail to Register.

E. The Attorney General's "Interim" Regulation Retroactively Applying SORNA to Mr. Reynolds Without Notice and Comment Violates the Administrative Procedures Act.

F. The Indictment Must Be Dismissed Because SORNA Impermissibly Encroaches Upon A State's Power By Forcing State Officials To Enforce A Federal Regulatory Scheme In Violation Of The Tenth Amendment and The Principles of Federalism.

II. MR. REYNOLDS' MOTION TO DISMISS SHOULD HAVE BEEN GRANTED AND HIS CONVICTION VACATED BECAUSE HE WAS NOT REQUIRED TO REGISTER IN PENNSYLVANIA UNDER "SORNA" UNTIL HE HAD BEEN IN THE STATE AT LEAST 30 DAYS.

On May 14, 2010 the Third Circuit Court of Appeals, following additional briefing concerning the Administrative Procedures Act and the Interim Rule, affirmed the judgment of the district court. The Court determined that Mr. Reynolds' claims concerning the Commerce Clause, the Ex Post Facto Clause and due process were foreclosed by its decision in United States v. Shenandoah, 595 F.3d 151 (3d Cir. 2010). The Court also held that Mr. Reynolds lacked standing to raise issues concerning the Interim Rule and the Tenth Amendment. (Appendix 1a herein, pages 2-3). Finally, the Court determined that Mr. Reynolds' argument

that he was actually innocent of violating SORNA was foreclosed by the appellate waiver in his plea agreement. (Appendix 1a herein, page 3).

On June 16, 2010 the Court of Appeals filed an order denying Mr. Reynolds' petition for rehearing en banc. (Appendix 2a herein.)

This petition followed.

STATEMENT OF THE FACTS

Billy Joe Reynolds of Missouri and Melissa Hall of Washington, Pennsylvania talked by cell phone for approximately two and a half years before he came to Pittsburgh. App. 136. Mr. Reynolds and Ms. Hall had gotten to know each other on a chat phone line called "C-Lounge." App. 136. According to the government Mr. Reynolds boarded a train in Missouri on September 16, 2007. App. 136.

Ms. Hall and her mother picked up Mr. Reynolds at the train station in Pittsburgh "after arriving here on September 17, 2007" from Missouri. App. 136. At the time, Billy Joe Reynolds was in his early 40s and Ms. Hall had turned 20 that September. App. 121, 136. After he arrived Mr. Reynolds stayed with the Halls in Washington, Pennsylvania and got a job working at Max and Erma's restaurant on the deep fryer. App. 136.

Mr. Reynolds was on parole in Missouri at the time he left for Pittsburgh. App. 136. On October 16, 2007, 29 days after arriving, Mr. Reynolds was arrested in Washington County, Pennsylvania for having absconded Missouri parole and was charged with the instant offense. App. 61. Billy Joe Reynolds had been convicted in Missouri in 2001 of second degree statutory sodomy, a felony. App. 135. Following his incarceration he registered as a sex offender in Missouri. App. 135. Mr. Reynolds "updated and verified his registration as

required on several occasions." App. 135. He also signed Missouri "forms notifying him of his registration obligations, including his obligation if he moved to another jurisdiction." App. 136. Missouri forms attached to the government's response to Mr. Reynolds' motion to dismiss state that an offender who moves out of state "must also meet that state's registration requirements." App. 111, 112.

According to the government's recitation of facts during Mr. Reynolds' guilty plea he did not "comply with Missouri sex offender registration requirements when he left Missouri for Pennsylvania" and he did not register in Pennsylvania after arriving. App. 136. The government also contended that Mr. Reynolds admitted that "he did not register as a sex offender in Pennsylvania" and that he knew he should have. App. 136. Mr. Reynolds agreed at the plea that he did not register in Pennsylvania. App. 137. However, Mr. Reynolds did not agree that he admitted to police that he knew he should have registered in Pennsylvania. App. 136-137.

Mr. Reynolds personally informed the judge that he had "difficulty" with "[r]eading and writing." App. 121. Counsel then added, "Your Honor, he's been in Special Ed. He can't really read or write, Your Honor." App. 121.

The district court then adjudged Mr. Reynolds guilty of knowing failure to register under S.O.R.N.A.[2] pursuant to 18 U.S.C. §2250(a), the federal failure-to-register offense.

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[2] On July 27, 2006 Congress enacted the Adam Walsh Child Protection and Safety Act of 2006 ("Adam Walsh Act"). Title I of the Adam Walsh Act codified S.O.R.N.A., which stands for Sex Offender Registration and Notification Act. *See* 42 U.S.C. § 16911 *et seq.*

REASONS FOR GRANTING THE WRIT

I. MR. REYNOLDS HAS STANDING UNDER THE PLAIN READING OF THE S.O.R.N.A. STATUTE TO RAISE CLAIMS CONCERNING THE ATTORNEY GENERAL'S INTERIM RULE AND REVIEW BY THIS COURT IS NEEDED TO RESOLVE THE CIRCUIT CONFLICT.

The Third Circuit's decision in this case, concluding that Mr. Reynolds lacks standing to challenge the Attorney General's interim rule making SORNA retroactively applicable to those who committed their underlying sex offense prior to its enactment date, conflicts with the decision of the Sixth Circuit Court of Appeals in United States v. Cain, 583 F.3d 408 (6th Cir. 2010) and United States v. Utesch, 596 F.3d 408, 307 (6th Cir. 2010).

Mr. Reynolds was prosecuted federally for failure to register as a sex offender under SORNA based on his 2001 Missouri conviction. Mr. Reynolds traveled from Missouri to Pennsylvania on September 17, 2007 and was arrested there on a Missouri parole warrant 29 days later on October 16, 2007. His pre-trial motion to dismiss on various grounds was denied.

The Third Circuit Court of Appeals ruled that Billy Joe Reynolds did not have standing to challenge applicability of the Sex Offender Registration and Notification Act (SORNA) to offenders, like him, who were convicted prior to its enactment because Reynolds was required under SORNA merely to keep his registration current, and was not required to initially register. United States v. Reynolds, Appeal No. 08-4747 non-

precedential opinion; reprinted herein as Appendix 1a). See 42 U.S.C. § 16913(d).

The Third Circuit's reading of 42 U.S.C. § 16913(d) ignored that the statute consists of two clauses and the first of those two clauses of the statute, underlined below, delegates the applicability of SORNA itself to the Attorney General. The text of 42 U.S.C. § 16913(d) states:

> The Attorney General shall have the authority to specify the applicability of the requirements of **this subchapter** to sex offenders convicted before July 27, 2006 or its implementation in a particular jurisdiction, *and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section.*

42 U.S.C. § 16913(d)(emphasis added).

Subchapter I begins with 42 U.S.C. § 16901 and ends with 42 U.S.C. § 16962. Undisputably, § 16913(d) is located within Subchapter I of SORNA. Therefore, the words of § 16913(d) in bold type above, "this subchapter," refer to Subchapter I of SORNA, which is located within Chapter 151 of Title 42. See 42 U.S.C. § 16911 et seq. ("Child Protection and Safety").

The Court of Appeals in Reynolds glosses over the fact that the text of § 16913(d) contains two clauses -- the first clause, which is underlined above, concerns retroactivity and does not limit the authority of the Attorney General. In particular, this first clause does not limit retroactive application of SORNA to sex offenders who did not register initially and not to

others who were obligated to keep their registration current. 42 U.S.C. § 16913(d).

The second clause of § 16913(d), which is italicized above, states: *"and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section."* Even if courts determine that this second clause is limited to sex offenders who have not initially registered as part of their obligations under a state registration scheme ("Megan's Law"), it does not limit the authority of the Attorney General with respect to retroactive application of SORNA to Mr. Reynolds' prosecution.

Furthermore, Subchapter I includes all sections of 42 U.S.C. § 16913, including §§ 16913(a)-(e). The requirement that sex offenders are required to keep their registration current is contained in 42 U.S.C. § 16913(a). Therefore, sex offenders who are required to "keep the registration current" are among those subject to the requirements in SORNA's Subchapter I. See 42 U.S.C. § 16913(a). As a result, SORNA's provision that delegates authority to the Attorney General applies to all sex offenders included in Subchapter I - even those who are required to "keep the registration current." 42 U.S.C. § 16913(a). Therefore, the Attorney General's Interim Rule applies to Mr. Reynolds.

On February 28, 2007, pursuant to 42 U.S.C. § 16913(d), the Attorney General issued an interim rule applying SORNA "to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of [the] Act." 28 C.F.R. § 72.3. This interim rule was issued without notice and comment and without a 30-day comment period based on the "good cause" provision of the Administrative Procedures Act (APA). See 72 Fed.Reg. 8894, 8896. The Attorney General stated, however, that comments would be accepted until April 30, 2007. See 72 Fed.Reg. 8895. The Attorney General's guidelines for SORNA did not become effective until August 1, 2008, which was 30 days after their publication. See 73 Fed.Reg. 38,030 ("SMART" guidelines) and 5 U.S.C. § 553(d).

According to the government, Mr. Reynolds violated SORNA because he did not keep his registration current. Mr. Reynolds was then prosecuted and imprisoned. The panel in Reynolds ignored the text of 42 U.S.C. § 16913(d) and took the position that because Mr. Reynolds was obligated by SORNA to "keep the registration current" that he was not subject to the "initial registration" requirements of 42 U.S.C. § 16913(a) and for that reason was not subject to the Attorney General's Interim Rule. However, assuming for argument only that Mr. Reynolds already registered initially pursuant to SORNA by registering under state law, he was still subject to the Interim Rule as an

offender who was required to "keep the registration current."[3] 42 U.S.C. § 16913(a). Therefore, Mr. Reynolds had standing to contest the viability of the Attorney General's Interim Rule. See United States v. Hays, 515 U.S. 737, 747 (1995).

The Court of Appeals ruled that Reynolds' case was governed by its decision in United States v. Shenandoah, 595 F.3d 151, 163 (3d Cir.), cert. den., __ U.S. __, 130 S.Ct. 3433 (June 14, 2010). There, the Court ruled, referring to the second clause of 42 U.S.C. § 16913(d), "[s]ince Shenandoah was already a registered sex offender when SORNA was enacted, SORNA only required him to keep his registration current on and after July 27, 2006" and SORNA's provisions concerning initial registration did not apply to him. See 42 U.S.C. § 16913(d). However, Mr. Reynolds contends that the plain text of the first clause of 42 U.S.C. § 16913(d) stating, "[t]he Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before July 27, 2006..." applies to him. Id.

In United States v. Carr this Court recently determined that the text of the Sex Offender Registration and Notification Act (SORNA) means what it plainly states regarding applicability to pre-SORNA travel: the statute's use of "the present tense

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[3] Mr. Reynolds does not concede that he is not required to "initially register" under SORNA. 42 U.S.C. § 16913(b).

('travels') rather than the past or present perfect ('traveled' or 'has traveled') reinforces the conclusion that preenactment travel falls outside the statute's compass." United States v. Carr, 130 S.Ct. 2229, 2236 (2010). In Carr, this Court looked to "normal usage" of language. Id. Likewise, the plain text of SORNA shows that the terms of 42 U.S.C. § 16913(d) apply to all sex offenders convicted of underlying offenses prior to July 27, 2006, including Mr. Reynolds. As such, Mr. Reynolds has standing to contest the Attorney General's interim rule. See United States v. Hays, 515 U.S. 737, 747 (1995).

Furthermore, the Third Circuit's decision in Mr. Reynolds' case declining to reach the question of whether SORNA violated the non-delegation doctrine or whether the Attorney General's Interim Rule violated SORNA is also in conflict with the decisions of the Sixth Circuit Court of Appeals. See United States v. Cain, 583 F.3d 408 (6th Cir. 2010) and United States v. Utesch, 596 F.3d 302, 307 (6th Cir. 2010)(rejecting the government's argument that Mr. Utesch lacked "standing to challenge the validity or any retroactive regulation issued by the Attorney General"). In Utesch the Sixth Circuit held that "a defendant in Utesch's position is not bound by the interim rule." 596 F.3d at 310.

The allegations against the appellant in Utesch, like those against Mr. Reynolds, were that he was required to keep his

registration current, not that he failed to register initially. 596 F.3d at 305. Like Mr. Reynolds, the appellant in Utesch was indicted after SORNA's 30-day notice and comment period, but before the final SMART guidelines were promulgated in July 2008. The Sixth Circuit held that Mr. Utesch was therefore not bound by the Attorney General's Interim Rule and vacated Utesch's conviction and sentence. 596 F.3d at 313. The salient facts in Utesch and Reynolds are identical. The Eighth Circuit has held that those in Mr. Reynolds' situation do not have standing to challenge the interim rule or the non-delegation clause. See United States v. Hacker, 565 F.3d 522 (8th Cir. 2009) and United States v. May, 535 F.3d 912 (8th Cir. 2008).

This Court should grant certiorari, vacate Mr. Reynolds' judgment and remand or accept his case for review.

II. S.O.R.N.A. VIOLATES THE CONSTITUTION AND THIS COURT SHOULD HEAR BILLY JOE REYNOLDS' CASE TO RESOLVE CONFLICTING COURT OPINIONS CONCERNING THE COMMERCE CLAUSE, THE EX POST FACTO CLAUSE AND DUE PROCESS.

This Court has only addressed the issues arising from SORNA twice and did not address the constitutional issues in either case. In United States v. Carr this Court resolved the issue in Mr. Carr's favor on the plain text of the statute and did not reach the *ex post facto* question. United States v. Carr, 130 S.Ct. 2229, 2233 (2010). Only one other case has come before this Court concerning SORNA, United States v. Juvenile Male, and there, a question was certified to the Montana Supreme Court to help determine whether the case was moot. United States v. Juvenile Male, 130 S.Ct. 2518, 2520 (2010)(per curiam).

In Juvenile Male, the juvenile was found delinquent by a federal court in June 2005. Id. at 1518. Under SORNA, which was enacted in 2006, the juvenile was required to keep his registration current. 42 U.S.C. §§ 16911(8); 16913. In February 2007 the Attorney General issued the Interim Rule stating that SORNA applied to sex offenders convicted prior to enactment of SORNA. 72 Fed.Reg. 8897 (codified at 28 CFR § 72.3(2009)). The Ninth Circuit "vacated the sex-offender-registration requirements" stating that "'retroactive application of SORNA's provision covering individuals who were adjudicated juvenile delinquents because of the commission of certain sex offenses

before SORNA's passage violates Ex Post Facto Clause of the United States Constitution.'" United States v. Juvenile Male, 130 S.Ct. 2518, 2519 (2010).

This Court has not ruled on whether SORNA violates the Ex Post Facto Clause. Likewise, this Court has not yet ruled on whether SORNA violates the Commerce Clause or due process. Each of these issues was rejected by the Third Circuit in Mr. Reynolds' case based on its precedent in United States v. Shenandoah, 595 F.3d 151, 163 (3d Cir.), cert. den., __ U.S. __, 130 S.Ct. 3433 (June 14, 2010). See United States v. Reynolds, No. 08-4747 (Appendix 1a herein). Each of these issues is represented by conflicting opinions in the courts below and this Court should accept Mr. Reynolds' case for review in order to provide direction to courts below.

A. The Third Circuit erred in upholding SORNA as a proper exercise of Congressional Authority under the Commerce Clause.

"Under our federal system, the 'States possess primary authority for defining and enforcing criminal law.'" United States v. Lopez, 514 U.S. 549, 561 n.3 (1995). Mr. Reynolds contended in the courts below that SORNA was unconstitutional on its face and as applied to him as a violation of the Commerce Clause. App. 31. The courts below failed to address Mr. Reynold's arguments that SORNA, including the registration

requirements of 42 U.S.C. §16913 and 18 U.S.C. §2250, do not fall into any of the "three broad categories of activity that Congress may regulate under its commerce power." United States v. Morrison, 529 U.S. 598, 608-609 (2000). Further, the presence of a jurisdictional element is not dispositive, but instead "may establish that the enactment is in pursuance of Congress' regulation of interstate commerce." Morrison, 529 U.S. at 612.

No nexus exists between Mr. Reynolds' travel and his alleged failure to register, which is a purely local act. Unlike similar statutes, such as the Travel Act, 18 U.S.C. §1951 or the Mann Act, 18 U.S.C. §2421, which require a defendant to travel in interstate commerce with the intent to commit certain prohibited acts, the travel element of §2250 does not require the travel occur in connection with a person's failure to register. To uphold the courts below in Mr. Reynolds' case would mean "there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government. *See* United States v. Lopez, 514 U.S. 549, 555 (1995). Because Congress lacks the authority under the Commerce Clause to direct individuals convicted of purely local offenses to register as state sex offenders, the first element of SORNA's criminal penalty under 18 U.S.C. §2250(a) cannot be met. *See* 18 U.S.C. §2250(a).

The United States Constitution created a federal government of limited enumerated powers. U.S. Constitution, Article I, §8. Congress may only enact legislation pursuant to the powers specifically delegated to it by the Constitution. *See* United States v. Lopez, 514 U.S. 549, 552 (1995). SORNA does not explain under what authority Congress imposed the registration requirements for those it defined as sex offenders.

In Lopez, the Supreme Court "identified three broad categories of activity that Congress may regulate under its commerce power." Lopez, 514 U.S. at 558. The areas that Congress has power and authority are:

1. to "regulate the use of the channels of interstate commerce;"

2. "to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities;" and

3. "to regulate those activities that substantially affect interstate commerce."

United States v. Lopez, 514 U.S. 549, 558 (1995). Mr. Reynolds contends that the SORNA regulations requiring him to register as a sex offender within the state where he resides, with the corresponding power to indict him criminally for failing to do so, are not encompassed within any of the three areas of permissible regulation in Lopez. Instead, SORNA's provisions regulate criminal activity, not economic activity. Any economic effect that the activities regulated by SORNA and

subject to prosecution is too attenuated to bring SORNA within the authority of the commerce clause. Any potential aggregated economic effect is insufficient to sustain SORNA. *See* Morrison, 529 U.S. at 617; Lopez, 514 U.S. at 564.

The existence of congressional findings that indicate that the statute is a valid exercise of Congress' Commerce Clause power will at least enable a court "to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce." Lopez, 514 U.S. at 563. Although Congress included findings in other sections of the Adam Walsh Act, SORNA contains no such findings. Like the Gun Free School Zone Act at issue in Lopez, SORNA is unsupported by legislative findings indicating that purely local sex crimes have any link with interstate commerce.

However, even the existence of legislative findings does not guarantee that the statute will be upheld as a valid exercise of Congressional power. The Violence Against Women Act, at issue in Morrison, was accompanied by "numerous findings regarding the serious impact that gender-motivated violence has on victims and their families." Morrison, 529 U.S. at 614. The Court still struck down the statute, holding that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." Id. Rather, the Court held that the determination of whether an

activity sufficiently affects interstate commerce is for the judiciary. Id. Because no commercial activity is involved, 42 U.S.C. §16913 and 18 U.S.C. §2250(a) violate the commerce clause as SORNA exceeds Congress' power and authority as outlined in Lopez. Mr. Reynolds recognizes that the majority of courts nationwide have ruled that SORNA is a valid exercise of authority under the commerce clause. However, most appellate courts have not decided the issue and, as the Supreme Court recognized in Lopez, "so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender 'legal uncertainty.'" United States v. Lopez, 514 U.S. 549, 566 (1995).

Lopez teaches that "[w]hen Congress criminalizes conduct already denounced as criminal by the States, it effects a 'change in the sensitive relation between federal and state criminal jurisdiction.'" Lopez, 514 U.S. at 561 n.3. That relationship has been altered dramatically by SORNA. For example, under SORNA what happens to a state's Megan's Law registration provision that is more protective of an offender's privacy rights than SORNA's and bases that extra protection in its own state constitution? The scheme under the Wetterling Act where each state already has in place a sex offender registry,

along with a criminal provision, the problem of protecting children from sex offenders through registry and punishment for failure to comply has been addressed. 42 U.S.C. §14071 et seq. In fact, SORNA currently relies on those same state registries as the basis for its federal criminal prosecutions, so it can hardly argue that state registry is inadequate. *See* 18 U.S.C. §2250(a).

Another lesson of Lopez is that any argument that SORNA is valid regulation under the commerce clause due to the "costs of crime" would lead, as the government in Lopez admitted, to excessive regulation of "not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." United States v. Lopez, 514 U.S. 549, 564 (1995).

B. If SORNA Applies to Mr. Reynolds, It Violates the Ex Post Facto Clause and is Unconstitutional.

Mr. Reynolds was convicted of a sex offense in Missouri in 2001, years before SORNA was enacted on July 27, 2006. App. 135. On February 28, 2007, the Attorney General of the United States issued an Interim Rule applying SORNA to sex offenders convicted before enactment of the federal criminal offense requiring registration as a sex offender. *See* 28 C.F.R. § 72.3. This interim rule aimed to subject Mr. Reynolds to federal criminal liability for coming to Pennsylvania and not registering as a

sex offender after he arrived on September 17, 2007. *See* 18 U.S.C. §2250(a) *and* 42 U.S.C. §16913-16916. At most, Mr. Reynolds should have been subject to a Pennsylvania crime for failure to register under state's "Megan's Law" provision or to a maximum one year sentence under the Wetterling Act, the predecessor to SORNA. *See* 42 Pa.C.S. §9791 *et seq.* and 42 U.S.C. §14072(i)(4). If Mr. Reynolds is subject to retroactive application of SORNA, it violates the *ex post facto* clause.

Article I, Section 9, Clause 2 of the United States Constitution prohibits the passing of an *ex post facto* law. See U.S. Const. Art. I, § 9, cl. 2. This Court has interpreted the *Ex Post Facto* Clause to apply to laws that "retroactively alter the definition of crimes and increase the punishment of criminal acts." Collins v. Youngblood, 497 U.S. 37, 43 (1990). Here, application of SORNA to Mr. Reynolds circumstances resulted in a ten-fold increase in potential punishment for his prior criminal acts. Furthermore, the ex post facto clause applies to Mr. Reynolds' prosecution because it was the intent of SORNA to impose punishment. *See* 18 U.S.C. §2250(a).

The ex post facto clause restricts vindictive legislation out of concern that a legislature's response to "political pressures poses a risk that they may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." Landgraf v. USI Film

Products, 511 U.S. 244, 266 (1994). Currently, political pressure has made sex offenders a reviled group in our country. See Shiela T. Caplis, Got Rights? Not if You're a Sex Offender in the Seventh Circuit, 2 Seventh Cir. Rev. 115 (2006)(describing the convicted sex offender as "perhaps the most despised and unsympathetic member of American society" noting "the general trend to strip convicted sex offenders of their rights").

Although this Court upheld sex offender registration and notification requirements in Smith v. Doe, 538 U.S. 84 (2003), that case involved a 42 U.S.C. §1983 action and the Court was sharply divided. *See* Smith, 538 U.S. at 87-88. Furthermore, the majority's conclusion was premised, in significant part, upon the non-punitive purpose surrounding a state's civil registry scheme. *See* Smith, 538 U.S. at 102. In addition, the provisions of SORNA differ significantly from those at issue in Smith. The Supreme Court's question in Smith was simply "whether the registration requirement is a retroactive punishment prohibited by the *Ex Post Facto* Clause." Smith, 538 U.S. at 89. Here, SORNA pairs "an independent federal obligation" to register directly with punishment of up to 10 years in prison, which is a much different ex post facto question. In Mr. Reynold's case, SORNA attached new, and as yet unidentified, legal consequences to events, specifically, Mr. Reynold's 2001 conviction, which

occurred years prior to SORNA's 2006 enactment. The additional requirements imposed by SORNA are punitive in both purpose and effect. For example: SORNA broadens the class of offenders subject to registration; expands the information gathered from those required to register; lengthens the registration; creates classes of offenders; reduces the time frame in advising the officials of any changes of required information; and substantially increases the penalties for a violation of any of the requirements. *Compare* 42 U.S.C. §14072 (Wetterling Act) with 42 U.S.C. §§16911 (SORNA, expansion of sex offender definition and expanded inclusion of "child predators"); §16915 (SORNA, addressing the duration of the registration requirements); 18 U.S.C. §2250 (SORNA, increasing the penalties for violations of the registration requirements).

Furthermore, Congress' stated purpose in enacting SORNA was punitive. *See* 42 U.S.C. §16901 (the Act was designed "to protect the public from sex offenders and offenders against children, and in response to vicious attacks by violent offenders against the victims listed below, . . ."). As the retroactive application of SORNA's more onerous and punitive requirements increases the punishment associated with Mr. Reynold's 2001 conviction by a factor of ten, it violates the *Ex Post Facto* Clause of the United States Constitution and, accordingly, Mr. Reynolds cannot be prosecuted under its provisions.

C. SORNA is Unconstitutional and its Application Violated Mr. Reynolds' Due Process Rights Because: 1) SORNA Has Not Been Implemented and There is No Duty to Register; and 2) Mr. Reynolds Never Received Actual Notice of His Duty to Register Under SORNA and, Therefore, Did Not Knowingly Fail to Register.

SORNA makes it a crime to "knowingly fail to register or update a registration as required by the Sex Offender Registration Notification Act." 18 U.S.C. §2250(a). Mr. Reynolds was convicted of a sex offense in Missouri in 2001, years before SORNA was enacted on July 27, 2006. Although Mr. Reynolds arrived in Pennsylvania in September 2007, a few months after an "interim rule" issued, and long before any SMART guidelines were promulgated, the Attorney General stated that SORNA applied to all sex offenders no matter when convicted, he was never informed of any obligation to register under SORNA. Since Mr. Reynolds had no notice or knowledge of SORNA's reporting requirements he cannot be prosecuted for knowingly violating §2250(a).

1. SORNA Has Not Been Implemented and Thus There Was No Duty, and Is No Duty, Under SORNA For Mr. Reynolds To Register.

Mr. Reynolds' prosecution for violation of SORNA violates his due process rights because he had no actual notice of SORNA or its registration requirements. SORNA explicitly provides that an appropriate government official must notify a sex

offender of his duty to register under SORNA. *See* 42 U.S.C. § 16917. For individuals in custody or awaiting sentencing for an offense giving rise to the duty to register under SORNA, the Government must notify them of their SORNA obligations immediately after they are released from custody or immediately after sentencing. *See* 42 U.S.C. § 16917(a). Specifically, the Government must (1) "inform the sex offender of the duties of a sex offender under [SORNA] and explain those duties," (2) "require the sex offender to read and sign a form stating that the duty to register has been explained and that the sex offender understands the registration requirement," and, (3) "ensure that the sex offender is registered." Id.

For those sex offenders who have already served their sentences for an offense committed before SORNA's enactment, like Mr. Reynolds, the Act directs the Attorney General to prescribe specific rules for notification. 42 U.S.C. § 16917(b). Furthermore, with respect to Mr. Reynolds' prosecution, the Attorney General had not promulgated any regulation making SORNA retroactively applicable to persons (1) convicted before SORNA's implementation in a particular state, or (2) "unable" to initially register under Section 16913(b) of SORNA. The Attorney General's proposed SMART Guidelines, however, explicitly provide that the Act becomes applicable to these two

groups of offenders only "when [a state] implements the SORNA requirements in its system." 72 Fed. Reg. at 30228.

States are required to implement SORNA the later of July 27, 2009 or one year after the Attorney General provides the states software to "enable jurisdictions to establish and operate uniform sex offender registries and Internet sites." 42 U.S.C. §§ 16923, 16924. The SMART Guidelines provide that a jurisdiction has not *implemented* SORNA until it has "carrie[d] out the requirements of SORNA as interpreted and explained in these Guidelines," and the SMART Office of the Department of Justice has determined that it has done so. 72 Fed. Reg. at 30213-14. Therefore, individuals with "pre-SORNA implementation convictions," like Mr. Reynolds, have a duty to register *only after* the jurisdiction implements the federal law.

> With respect to sex offenders with pre-SORNA or pre-SORNA implementation convictions who remain in the prisoner, supervision, or registered sex offender populations **at the time of implementation** . . . jurisdictions should endeavor to register them with SORNA as quickly as possible. . . In other words, sex offenders in these populations must be registered by the jurisdiction **when it implements** the SORNA requirements in its system.

72 Fed. Reg. at 30228 (emphasis added).

Pennsylvania still has not yet implemented SORNA. As noted by the Attorney General in the SMART Guidelines, a jurisdiction has not implemented SORNA until it has (1) "carrie[d] out the requirements of SORNA as interpreted and explained in these Guidelines," and (2) the SMART Office has determined that it has

done so. 72 Fed. Reg. at 30213-30214. Because Pennsylvania has failed to implement SORNA, Mr. Reynolds cannot possibly be subject to its penalty.

Furthermore, because Mr. Reynolds was "unable" to initially register under § 16913(b) of SORNA and Pennsylvania has not implemented SORNA, he cannot comply with SORNA. No process exists by which he can bring himself in compliance with the Act. Criminalizing the failure to do something that is impossible to do violates the Due Process Clause's guarantee of fundamental fairness. *See* United States v. Dalton, 960 F.2d 121, 124 (10th Cir. 1992) (it is a violation of fundamental fairness to hold someone liable for a crime when an essential element of the crime is his failure to perform an act that he is incapable of performing). Because it was (and remains) impossible for Mr. Reynolds to comply with SORNA in Pennsylvania, punishing him for failing to register under that statute violates his due process rights.

2. Mr. Reynolds Never Received Notice of His Duty to Register Under SORNA and Therefore Did Not Knowingly Fail to Register.

The fair notice requirements of the Due Process Clause encompass principles of notice, fair warning and forseeability, especially in the context of criminal penalties and do not permit prosecution of Mr. Reynolds. *See* U. S. Const. Amend. V.

Also Rogers v. Tennessee, 532 U.S. 451, 460 (2001). Title 18, U.S.C. § 2250(a)(3) provides that a defendant must *knowingly* fail to register in order to violate the statute. Mr. Reynolds' Missouri conviction took place in 2001, years before SORNA was enacted. Therefore, it was impossible for him to "knowingly" fail to register "as required by" SORNA. 18 U.S.C. §2250(a). Since Mr. Reynolds had no notice or knowledge of SORNA's reporting requirements, his conviction for violating §2250 must fall. It is also impossible at this time to register under SORNA because no state has implemented SORNA's registration requirements.

Further, the plain language of 42 U.S.C. § 16917 ("Duty to notify sex offenders of registration requirements and to register") requires the government affirmatively to inform offenders of SORNA before any duty to register under SORNA arises. *See* 42 U.S.C. § 16917(b). Mr. Reynolds was never told he had to register under SORNA. Thus, Mr. Reynolds had no actual notice of his need to register in Pennsylvania or under SORNA. Without actual notice, Mr. Reynolds could not have knowingly failed to register.

Even if this Court concludes that Mr. Reynolds received registration forms from Missouri concerning a requirement to register, that is not legally sufficient notice. Any notice to register that Mr. Reynolds may have received under state law

cannot substitute for notice under the different, and much stricter SORNA requirements. The Department of Justice "SMART" Office Guidelines include an example that clarifies that notice to register under an existing state sex offender law does not serve as notice under SORNA:

> Example 2: A sex offender is required to register for life by a jurisdiction based on a rape conviction in 1995 for which he was released from imprisonment in 2005. The sex offender was initially registered prior to his release from imprisonment on the basis of the jurisdiction's existing law, but the information concerning registration duties he was given at the time of release did not include telling him that he would have to appear periodically in person to verify and update the registration information (as required by SORNA § 116) because the jurisdiction did not have such requirement at the time. **So the sex offender . . . will have to be given new instructions about that as a part of the jurisdiction's implementation of SORNA.**

72 Fed. Reg. 30228 (emphasis added).

In the absence of the required SORNA notice, prosecuting Mr. Reynolds for failing to register violates his due process rights. This Court's decision in Lambert v. California, 355 U.S. 225 (1958) illustrates this point. In that case, the Court invalidated under the Due Process Clause a prosecution for failing to register as a felon, as required by a Los Angeles city ordinance. Id. In finding a due process violation, the Court held that when "wholly passive" conduct such as the "mere failure to register" is criminalized, notice is essential:

> Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that a citizen has the chance to defend charges.... Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act.... [T]he principle is equally appropriate where a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case.

Lambert, 355 U.S. at 228. As in Lambert, Mr. Reynolds is being prosecuted for wholly passive conduct - failing to register - when he had no notice that a federal statute required him to do so. The Supreme Court in Lambert specifically rejected the argument that "ignorance of the law is no excuse" in the context of "failure to register." Lambert, 355 U.S. at 228. Therefore, applying SORNA and, in particular, 18 U.S.C. §2250 to Mr. Reynolds violates due process.

CONCLUSION

For all of the foregoing reasons the petitioner, Billy Joe Reynolds, respectfully requests that this Court grant the petition for writ of certiorari, and accept this case for review. In the alternative, Mr. Reynolds requests that his petition be granted, his sentence vacated and his case remanded.

Respectfully submitted,

CANDACE CAIN
Assistant Federal Public Defender
Counsel for Petitioner,
Billy Joe Reynolds

CERTIFICATE OF MEMBERSHIP IN BAR

I, Candace Cain, Assistant Federal Public Defender, hereby certify that I am a member of the Bar of this Court.

CANDACE CAIN
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit was mailed this 14th day of September, 2010, to the following:

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No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER 2009 TERM

BILLY JOE REYNOLDS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

DECLARATION PURSUANT TO RULE 29.2
OF THE RULES OF THE SUPREME COURT

I declare under penalty of perjury under the laws of the United States of America that the Petition for Writ of Certiorari on behalf of Billy Joe Reynolds was mailed to the Clerk's Office of the United States Supreme Court in Washington, D.C., postage and fees paid (USC-426), First Class Mail.

DATE: September 14, 2010

CANDACE CAIN
Assistant Federal Public Defender
Counsel for Petitioner,
Billy Joe Reynolds

OPPOSITION BRIEF

ORIGINAL

Supreme Court, U.S.
FILED
NOV 19 2010
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No. 10-6549

IN THE SUPREME COURT OF THE UNITED STATES

BILLY JOE REYNOLDS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 2250(a), which imposes criminal penalties on a sex offender who is required to register under the Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. 16901 et seq., travels in interstate commerce, and knowingly fails to register, is applicable to petitioner.

2. Whether 18 U.S.C. 2250(a) constitutes a valid exercise of Congress's power under the Commerce Clause of the Constitution, Art. I, § 8, Cl. 3.

3. Whether the Ex Post Facto Clause precludes prosecution under 18 U.S.C. 2250(a) of a person whose travel in interstate commerce occurred after SORNA was enacted and after the Attorney General issued an interim rule confirming that SORNA applies to all sex offenders.

4. Whether petitioner's conviction violates the Due Process Clause on the ground that it was impossible for petitioner to register in Pennsylvania, and because petitioner did not receive specific notice of a duty under SORNA to register as a sex offender and update his registration.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a, at 1-3) is not published in the Federal Reporter but is reprinted in 380 Fed. Appx. 125.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 2010. A petition for rehearing was denied on June 16, 2010 (Pet. App. 2a, at 1-2). The petition for a writ of certiorari was filed on September 14, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the Western District of Pennsylvania, petitioner was convicted of failing to register and update his registration as a convicted sex offender, in violation of 18 U.S.C. 2250(a). He was sentenced to 18 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1a, at 1-3; C.A. App. 4-6, 142-143.

1. On July 27, 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. 16901 et seq., which "establishe[d] a comprehensive national system for the registration of [sex] offenders." 42 U.S.C. 16901. Since at least 1996, all 50 States have had sex-offender-registration laws, see Smith v. Doe, 538 U.S. 84, 90 (2003), and SORNA requires, as a matter of federal law, every sex offender to "register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 42 U.S.C. 16913(a). SORNA defines a "sex offender" as "an individual who was convicted of a sex offense" that falls within the statute's defined offenses. 42 U.S.C. 16911(1) and (5)-(7).

SORNA's registration requirements are divided into two categories. First, SORNA requires a sex offender to initially register following conviction:

> The sex offender shall initially register--
>
> (1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or
>
> (2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

42 U.S.C. 16913(b). Second, SORNA requires a sex offender who has already registered to keep his registration current by updating it within three business days of any change in his "name, residence, employment, or student status." 42 U.S.C. 16913(c).

SORNA delegates to the Attorney General the authority to promulgate further registration requirements in certain situations:

> Initial registration of sex offenders unable to comply with subsection (b) of this section
>
> The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before [July 27, 2006] or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section.

42 U.S.C. 16913(d).

On February 28, 2007, the Attorney General issued an interim rule, effective on that date, specifying that "[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 28 C.F.R. 72.3. In the preamble to the rule, the Attorney General explained that "[c]onsidered fa-

cially, SORNA requires all sex offenders who were convicted of sex offenses in its registration categories to register in relevant jurisdictions, with no exception for sex offenders whose convictions predate the enactment of SORNA." 72 Fed. Reg. 8896 (2007). The interim rule, however, served the purpose of "confirming SORNA's applicability" to "sex offenders with predicate convictions predating SORNA." Ibid.

In order to enforce SORNA's registration requirements, Congress also created a federal criminal offense penalizing non-registration. Under 18 U.S.C. 2250(a), a convicted sex offender who "is required to register under [SORNA]," "travels in interstate or foreign commerce," and then "knowingly fails to register or update a registration as required by [SORNA]" may be punished by up to ten years of imprisonment. See Carr v. United States, 130 S. Ct. 2229, 2234-2235 (2010).

2. In 2001, petitioner was convicted in Missouri of statutory sodomy in the second degree. C.A. App. 60, 135. In 2005, petitioner was released from prison and, pursuant to Missouri law, petitioner registered as a sex offender in Missouri. Id. at 60. In doing so, petitioner signed sex offender forms notifying him of his duty to update his registration in Missouri and his duty to register as a sex offender in any State to which he might move. Id. at 60, 111-112. In September 2007, while still on parole,

petitioner moved to Pennsylvania and knowingly failed to register as a sex offender there. Id. at 61, 134-135.

In November 2007, a federal grand jury in the Western District of Pennsylvania returned an indictment charging petitioner with failing to register and update a registration as a sex offender, in violation of 18 U.S.C. 2250(a). C.A. App. 20. Petitioner moved to dismiss the indictment, raising several constitutional and statutory claims. Id. at 21-23. The district court denied the motion, id. at 1-3, and petitioner thereafter entered a conditional guilty plea reserving his right to appeal the denial of his motion to dismiss, id. at 119-145. The district court sentenced petitioner to 18 months of imprisonment, to be followed by three years of supervised release. Id. at 5-6.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a, at 1-3. The court first rejected petitioner's claims that SORNA violates (a) the Commerce Clause because of an insufficient nexus between the registration requirements and interstate commerce; (b) the Ex Post Facto Clause because SORNA's penalty provision allegedly punishes only pre-SORNA conduct; and (c) the Due Process Clause because the State of Pennsylvania had not implemented SORNA, and because petitioner was not specifically notified of his duty to register under SORNA (even though he was notified of his state-law duty to register). Id. at 2. The court explained that each of petitioner's claims was foreclosed by the

court's prior decision in United States v. Shenandoah, 595 F.3d 151 (3d Cir.), cert. denied, 130 S. Ct. 3433 (2010). Pet. App. 1a, at 2.

The court of appeals also held that petitioner lacked standing to raise his other arguments, including his claim that the Attorney General's interim rule confirming that SORNA applies to pre-SORNA convictions violates the Administrative Procedure Act (APA), 5 U.S.C. 553. Pet. App. 1a, at 2-3. The court explained that it had already held in Shenandoah, 595 F.3d at 163-164, that the Attorney General did not need to promulgate any regulation for SORNA's requirements to be applicable to sex offenders, like petitioner, who had already initially registered with a State. Pet. App. 1a, at 3. Because the interim rule did not apply to petitioner, the court of appeals concluded that he lacked standing to challenge it on APA grounds. Ibid.

ARGUMENT

1. Petitioner first argues (Pet. 13-19) that the court of appeals erred in concluding that petitioner lacks standing to challenge the Attorney General's interim rule confirming that SORNA applies to all sex offenders. Petitioner contends that SORNA's registration and penalty provisions did not of their own force apply to him at the time of his interstate travel because his predicate sex-offense conviction was entered before the enactment of SORNA; that SORNA delegates authority to the Attorney General to

prescribe rules for offenders convicted of a predicate sex offense before SORNA's enactment; and that petitioner is therefore subject to the Attorney General's interim rule and has standing to challenge it. That claim lacks merit and does not warrant this Court's review.

a. SORNA was enacted and became effective on July 27, 2006, and its registration requirements are unqualified: "A sex offender shall register, and keep the registration current, in each jurisdiction in which the offender" lives, works, or is a student. 42 U.S.C. 16913(a). SORNA defines a "sex offender" as anyone who "was convicted" of a sex offense, without further qualification. 42 U.S.C. 16911(1). On its face, therefore, SORNA requires all sex offenders to comply with its registration requirements. That broad scope reflects Congress's primary purpose in enacting the statute, which was to establish a "comprehensive national system for the registration of [sex] offenders," in order to prevent evasion of state registration systems and to better protect the public. 42 U.S.C. 16901.

The court of appeals (Pet. App. 1a, at 3) correctly concluded that petitioner lacks standing to challenge the Attorney General's interim rule because SORNA applies of its own force to sex offenders, like petitioner, who were required to initially register as a sex offender with a State prior to SORNA's enactment. See, e.g., United States v. DiTomasso, 621 F.3d 17, 19-25 (1st Cir.

2010) (holding that "SORNA applied to previously convicted sex offenders as of the date of its enactment"); United States v. Shenandoah, 595 F.3d 151, 158, 163-164 (3d Cir.) (same), cert. denied, 130 S. Ct. 3433 (2010); United States v. Hinckley, 550 F.3d 926, 930-935 (10th Cir. 2008) (same), cert. denied, 129 S. Ct. 2383 (2009); United States v. May, 535 F.3d 912, 918-919 (8th Cir. 2008) (same), cert. denied, 129 S. Ct. 2431 (2009). As this Court noted in Carr v. United States, 130 S. Ct. 2229, 2234 n.2 (2010), there is disagreement among the courts of appeals on whether SORNA's registration requirements apply of the statute's own force to persons with sex-offense convictions that predate SORNA's enactment or whether Congress intended for the Attorney General to decide that question in the first instance. Carr did not address that issue. Ibid. That conflict, however, is not directly implicated here because petitioner's interstate travel and failure to register occurred between September and October 2007, seven months after the Attorney General issued the interim rule. C.A. App. 20.

b. Even if the court of appeals incorrectly concluded that petitioner lacked standing to challenge the interim rule, petitioner would not be entitled to any relief unless the interim rule was itself invalid. To the extent the petition could be read as arguing that the interim rule was issued in violation of the

notice, comment, and publication requirements of the APA, that claim lacks merit.[1]

In the months following SORNA's enactment, the Attorney General observed that sex offenders whose offenses occurred before SORNA's enactment were "attempting to devise arguments that SORNA is inapplicable to them, e.g., because a rule confirming SORNA's applicability has not been issued." 72 Fed. Reg. at 8896. Sex offenders raising such claims relied on 42 U.S.C. 16913(d), which delegates to the Attorney General the authority to specify SORNA's applicability to certain sex offenders. Although that provision exists to ensure "a means to resolve issues about the scope of SORNA's applicability * * * and a means to fill any gaps there may be concerning registration procedures or requirements," 72 Fed. Reg. at 8896, sex offenders argued that Section 16913(d) negated the unequivocal language in Section 16913(a) and indicated that SORNA does not, of its own force, apply to all sex offenders. The Attorney General issued an interim rule to "foreclose[] such claims by making it indisputably clear that SORNA applies to all sex offenders (as the Act defines that term) regardless of when they were convicted." Ibid. Thus, the interim rule states that "[t]he requirements of [SORNA] apply to all sex offenders, including sex

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[1] As discussed, the court of appeals did not decide this APA claim, concluding instead that petitioner lacked standing to raise the claim because petitioner was required to register upon SORNA's enactment. See Pet. App. 1a, at 3.

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offenders convicted of the offense for which registration is required prior to the enactment of [SORNA]." 28 C.F.R. 72.3.

The APA requires "notice of proposed rule making" and an "opportunity to participate in the rule making through submission" of comments, 5 U.S.C. 553(b) and (c), unless "the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest," 5 U.S.C. 553(b)(B). The APA also requires publication of "a substantive rule * * * not less than 30 days before its effective date, except * * * as otherwise provided by the agency for good cause found and published with the rule." 5 U.S.C. 553(d). A reviewing court asks whether an agency's findings are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A).

In promulgating the interim rule confirming that SORNA's registration requirements apply to all sex offenders, the Attorney General explained that "[t]he immediate effectiveness of this rule is necessary" because postponing the rule's implementation could delay the registration of "virtually the entire existing sex offender population" and would thereby risk "the commission of additional sexual assaults and child sexual abuse or exploitation offenses * * * that could have been prevented had local authorities and the community been aware of the[] presence" of unregis-

tered sex offenders. 72 Fed. Reg. at 8896-8897. Delay in the registration of sex offenders would also create "greater difficulty in apprehending perpetrators who have not been registered and tracked as provided by SORNA." Id. at 8897. The Attorney General found that those consequences "would thwart the legislative objective of 'protect[ing] the public from sex offenders and offenders against children' by establishing 'a comprehensive national system for the registration of those offenders,'" ibid. (quoting 42 U.S.C. 16901), because "a substantial class of sex offenders could evade the Act's registration requirements and enforcement mechanisms during the pendency of a proposed rule and delay in the effectiveness of a final rule," ibid. The Attorney General therefore determined that it would be "contrary to the public interest to adopt this rule with the prior notice and comment period normally required under 5 U.S.C. 553(b) or with the delayed effective date normally required under 5 U.S.C. 553(d)." Ibid.

The Attorney General complied with the APA's good-cause provisions in dispensing with the notice, comment, and publication requirements of that Act. The commission of additional sexual assaults and child sexual abuse and exploitation by recidivist sex offenders is undoubtedly contrary to the public interest. And, as this Court has noted, "[t]he risk of recidivism posed by sex offenders is 'frightening and high.'" Smith v. Doe, 538 U.S. 84, 103 (2003) (quoting McKune v. Lile, 536 U.S. 24, 34 (2002)

(plurality opinion)). As other courts have correctly held, "[d]elaying implementation of the regulation to accommodate notice and comment could reasonably be found to put the public safety at greater risk" by depriving local authorities and members of the public of awareness of sex offenders in their community. United States v. Gould, 568 F.3d 459, 470 (4th Cir. 2009), cert. denied, 130 S. Ct. 1686 (2010); see, e.g., United States v. Dean, 604 F.3d 1275, 1281 (11th Cir. 2010) (holding that "public safety" concerns provided "good cause for bypassing the notice and comment period" because "[i]n practical terms, the retroactive rule reduced the risk of additional sexual assaults and sexual abuse by sex offenders by allowing federal authorities to apprehend and prosecute them"), petition for cert. pending, No. 10-5632 (filed July 27, 2010). Indeed, because awareness of sex offenders in the community so directly relates to the ability to prevent further sex crimes, the Seventh Circuit dismissed the good-cause argument presented here as "frivolous." United States v. Dixon, 551 F.3d 578, 583 (2008), rev'd on other grounds sub nom. Carr v. United States, 130 S. Ct. 2229 (2010).

c. Every court of appeals to have decided the issue has held that SORNA applies to sex offenders who were convicted of a predicate offense before SORNA's enactment. See United States v. George, No. 08-30339, 2010 WL 4291497, at *4 n.3 (9th Cir. Nov. 2, 2010); DiTomasso, 621 F.3d at 19-25 (1st Cir.); Dean, 604 F.3d at

1278-1282 (11th Cir.); United States v. Utesch, 596 F.3d 302, 308, 311 (6th Cir. 2010); Shenandoah, 595 F.3d at 163-164 (3d Cir.); Gould, 568 F.3d at 462-466 (4th Cir.); Dixon, 551 F.3d at 582 (7th Cir.); Hinckley, 550 F.3d at 929-935 (10th Cir.); May, 535 F.3d at 915-919 (8th Cir.).

The only relevant difference of opinion among the courts of appeals concerns the precise date on which SORNA became applicable to pre-SORNA sex offenders. Of the circuits to have considered this question, all but one has held that SORNA became applicable to pre-SORNA sex offenders no later than February 28, 2007, the date of the Attorney General's interim rule. The Sixth Circuit alone has held that SORNA did not become applicable to pre-SORNA sex offenders until August 1, 2008 -- 30 days after publication of the final SORNA guidelines, which issued after notice and comment and which affirmed that SORNA applies to such offenders. See Utesch, 596 F.3d at 311. That ruling rested in part on the Sixth Circuit's prior decision in United States v. Cain, 583 F.3d 408, 419-424 (2009), in which the court held that the February 2007 interim rule was issued in violation of the APA's notice, comment, and publication requirements. Other courts have rejected the Sixth Circuit's APA analysis. See Dean, 604 F.3d at 1278-1282 (11th Cir.); Gould, 568 F.3d at 469-470 (4th Cir.); Dixon, 551 F.3d at 583 (7th Cir.). This Court noted in Carr that courts have divided "on whether § 72.3 was properly promulgated," and it "express[ed] no view" on

that question. 130 S. Ct. at 2234 n.2 (citing cases).

That disagreement, however, does not warrant this Court's review because it is narrow, transitory, and of diminishing importance. The Court's resolution of precisely when SORNA became applicable to pre-SORNA sex offenders would affect only those defendants who both were convicted of their predicate sex crimes before SORNA's enactment and violated SORNA before August 1, 2008. The number of defendants who fall into that category is limited. And the likelihood that any defendant will be prosecuted in the future for registration failures that occurred before August 1, 2008 -- a date that is now more than two years in the past -- is small and rapidly diminishing. This Court's review would thus affect only a handful of defendants and would have little if any prospective significance. This Court has already denied at least two petitions for a writ of certiorari seeking review of this issue. See Foster v. United States, No. 09-9247, 2010 WL 677665 (Oct. 4, 2010); Gould v. United States, 130 S. Ct. 1686 (2010) (No. 09-6742). The same result is warranted here.

2. Petitioner next argues (Pet. 21-26) that SORNA's registration and penalty provisions exceed Congress's power under the Commerce Clause. For the reasons set forth in the government's brief in opposition in Foster, supra (at 28-33), a copy of which has been served on counsel for petitioner, that claim lacks merit. This Court has previously denied at least nine petitions for a writ

of certiorari raising the same Commerce Clause claim. See Foster, supra (No. 09-9247); Griffey v. United States, 130 S. Ct. 3290 (2010) (No. 09-9676); Brown v. United States, 130 S. Ct. 2403 (2010) (No. 09-8833); Letourneau v. United States, 130 S. Ct. 1736 (2010) (No. 09-7368); Gould, supra (No. 09-6742); Myers v. United States, 130 S. Ct. 1559 (2010) (No. 09-8524); Hacker v. United States, 130 S. Ct. 302 (2009) (No. 09-5656); Howell v. United States, 129 S. Ct. 2812 (2009) (No. 08-10364); May v. United States, 129 S. Ct. 2431 (2009) (No. 08-7997). The same result is warranted here.

Every court of appeals to consider a Commerce Clause challenge to SORNA has rejected it. See George, 2010 WL 4291497, at *3-*4 (9th Cir.); DiTomasso, 621 F.3d at 26 (1st Cir.); United States v. Vasquez, 611 F.3d 325, 329-331 (7th Cir. 2010); Shenandoah, 595 F.3d at 160-161 (3d Cir.); United States v. Guzman, 591 F.3d 83, 89-91 (2d Cir.), cert. denied, 130 S. Ct. 3487 (2010); United States v. Whaley, 577 F.3d 254, 258-261 (5th Cir. 2009); Gould, 568 F.3d at 470-475 (4th Cir.); United States v. Ambert, 561 F.3d 1202, 1210-1212 (11th Cir. 2009); United States v. Howell, 552 F.3d 709, 717 (8th Cir.), cert. denied, 129 S. Ct. 2812 (2009); Hinckley, 550 F.3d at 939-940 (10th Cir.). Because the ruling of the court of appeals was correct and because there is no division in the circuits, further review of petitioner's Commerce Clause challenge is unwarranted.

3. Petitioner also argues (Pet. 26-29) that his conviction for failing to register under SORNA violates the Ex Post Facto Clause. There is no circuit conflict on this question, and this Court has already denied at least one petition for a writ of certiorari raising the same claim. See Foster, supra (No. 09-9247). There is no reason for a different result here.

Petitioner's attempts (Pet. 28-29) to distinguish SORNA from the Alaska sex-offender-registration regime that this Court sustained against an Ex Post Facto Clause challenge in Smith, supra, do not withstand scrutiny. Like SORNA, the Alaska law required prompt registration upon a change of residence, Smith, 538 U.S. at 90; it created classes of offenders and required offenders in the most dangerous class to register for an extended period of time, ibid.; and it subjected those who knowingly failed to register to criminal prosecution (including felony prosecution for repeat offenders), Alaska Stat. §§ 11.56.835, 11.56.840 (2000). In any event, Smith recognized that using the criminal process to enforce a statutory registration regime did not render the registration regime punitive for purposes of ex-post-facto analysis, 538 U.S. at 96, and that any criminal prosecution for violation of the registration requirements is "a proceeding separate from the * * * original offense" that required registration, id. at 102.

SORNA does not criminalize conduct that occurred wholly before it was enacted. To the contrary, petitioner's conviction clearly rests on post-SORNA conduct. He is being punished for his travel in interstate commerce combined with his knowing failure to register as SORNA requires -- both of which occurred after SORNA applied to him. Thus, Section 2250 does not violate the Ex Post Facto Clause because it does not "operate retroactively" in the sense of applying to conduct that was "completed before its enactment." Johnson v. United States, 529 U.S. 694, 699 (2000); see California Dep't of Corr. v. Morales, 514 U.S. 499, 505 (1995); Collins v. Youngblood, 497 U.S. 37, 49 (1990); Miller v. Florida, 482 U.S. 423, 430 (1987). Every court of appeals to have considered such an Ex Post Facto claim has rejected it. See, e.g., George, 2010 WL 4291497, at *4-*5 (9th Cir.); Shenandoah, 595 F.3d at 158-159 (3d Cir.); Guzman, 591 F.3d at 94 (2d Cir.); United States v. Young, 585 F.3d 199, 202-204 (5th Cir. 2009); Gould, 568 F.3d at 466 (4th Cir.); Hinckley, 550 F.3d at 935-938 (10th Cir.); May, 535 F.3d at 919-920 (8th Cir.).

4. Finally, petitioner contends (Pet. 30-36) that his conviction violates the Due Process Clause because SORNA has not been implemented by the State of Pennsylvania, and because he did not receive specific notice of his duty under SORNA to register as a sex offender, but rather received notice only of his duty under state law to register. Neither claim warrants review.

a. Petitioner argues (Pet. 31) that the interim rule does not declare SORNA applicable to those "convicted before SORNA's implementation in a particular state." As a threshold matter, no such regulation was needed because the statute, on its face, requires all sex offenders to register. See, e.g., DiTomasso, 621 F.3d at 27 ("Of critical importance, however, the registration requirements for sex offenders are neither conditioned on nor harnessed to state implementation of SORNA's state-directed mandates."); Guzman, 591 F.3d at 93("SORNA creates a federal duty to register with the relevant existing state registries regardless of state implementation of the specific additional requirements of SORNA."). In any event, the Attorney General's interim rule expressly states that SORNA applies "to all sex offenders." 28 C.F.R. 72.3 (emphasis added). Contrary to petitioner's contention (Pet. 31-32), the Attorney General later reaffirmed in the proposed and final SORNA guidelines that SORNA's registration requirements apply even before a particular State has implemented SORNA. See 72 Fed. Reg. 30,228 (2007) ("SORNA applies to all sex offenders, including those convicted of their registration offenses * * * prior to particular jurisdictions' incorporation of the SORNA requirements into their programs."); 73 Fed. Reg. 38,063 (2008) (same).[2]

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[2] Petitioner asserts (Pet. 33, 34) that it was impossible for him to comply with his known duty to register as a sex offender in Pennsylvania. That assertion, if true, would have furnished an

The courts of appeals to have addressed this issue directly have all concluded that SORNA applies to sex offenders who (like petitioner) initially registered as a sex offender before SORNA's enactment and whose SORNA violation occurred before the State's implementation of that Act. See George, 2010 WL 4291497, at *1-*2 (9th Cir.); DiTomasso, 621 F.3d at 27 (1st Cir.); United States v. Heth, 596 F.3d 255, 258-259 (5th Cir. 2010); Shenandoah, 595 F.3d at 157-158 (3d Cir.); Guzman, 591 F.3d at 93-94 (2d Cir.); United States v. Griffey, 589 F.3d 1363, 1366 (11th Cir. 2009) per curiam), cert. denied, 130 S. Ct. 3290 (2010).[3] Further review is not warranted.

b. Petitioner also argues (Pet. 33-36) that he never received notice of his duty to register under SORNA specifically, and that his conviction therefore violates principles of fair notice. Petitioner did, however, receive express written notice of his continuing duty to update his sex-offender registration upon

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affirmative defense, see 18 U.S.C. 2250(b), but petitioner waived that defense by pleading guilty. See United States v. Brown, 586 F.3d 1342, 1349-1350 (11th Cir. 2009), cert. denied, 130 S. Ct. 2403 (2010).

[3] Although the Sixth Circuit in Cain, supra, suggested that SORNA did not, on its face, apply to "sex offenders convicted before the enactment of this Act or its implementation in a particular jurisdiction," 583 F.3d at 415 (emphasis added), it vacated the defendant's conviction because he was convicted of a sex offense before the Attorney General had validly specified SORNA's applicability to sex offenders with pre-SORNA convictions. No court of appeals has vacated a conviction because the defendant's failure to register occurred before SORNA's implementation in a particular jurisdiction.

changing his address. C.A. App. 111-112. And for the reasons set forth in the government's brief in opposition in Foster, supra (at 21-24), petitioner's claim lacks merit. This Court has already denied at least five petitions for a writ of certiorari raising the due process claim presented here. See Foster, supra (No. 09-9247); Griffey, supra (No. 09-9676); Brown, supra (No. 09-8833); Letourneau, supra (No. 09-7368); Baccam v. United States, 130 S. Ct. 432 (2009) (No. 09-6386). There is no reason for a different result here.

Every court of appeals to address the question has held that notification of a state-law duty to register and keep a registration current -- the kind of notice that petitioner had here (C.A. App. 111-112, 135) -- satisfies due process. See United States v. Gagnon, 621 F.3d 30, 33 (1st Cir. 2010); Shenandoah, 595 F.3d at 160 (3d Cir.); United States v. Hester, 589 F.3d 86, 91-92 (2d Cir. 2009) (per curiam), cert. denied, 130 S. Ct. 2137 (2010); Brown, 586 F.3d at 1351 (11th Cir.); Whaley, 577 F.3d at 262 (5th Cir.); Gould, 568 F.3d at 468-469 (4th Cir.); Hinckley, 550 F.3d at 938 (10th Cir.); May, 535 F.3d at 921 (8th Cir.); Dixon, 551 F.3d at 584 (7th Cir.). Those decisions do not conflict with any decision of this Court, and further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

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Assistant Attorney General

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NOVEMBER 2010

No. 10-6549

IN THE SUPREME COURT OF THE UNITED STATES

BILLY JOE REYNOLDS, PETITIONER

v.

UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION**, via e-mail and first class mail, postage prepaid, this **November 19, 2010**.

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CONCLUSION

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Respectfully submitted.

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REPLY BRIEF

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UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
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FOR THE THIRD CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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STATUTORY PROVISIONS INVOLVED

Administrative Procedures Act (APA), in Pertinent Part:

5 U.S.C. § 553. Rule making

* * *

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include -

(1) a statement of the time, place, and nature of the public rule making proceedings;
(2) reference to the legal authority under which the rule is proposed; and
(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply -

* * *

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

* * *

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except -

* * *

(3) as otherwise provided by the agency for good cause found and published with the rule.

5 U.S.C. §§ 553(b)(3)(B) and (d)(3).

Sex Offender Registration and Notification Act (SORNA), in Pertinent Part:

CHAPTER I - CHILD PROTECTION AND SAFETY

SUBCHAPTER I - SEX OFFENDER REGISTRATION AND NOTIFICATION

* * *

Part A - Sex Offender Registration and Notification

* * *

42 U.S.C. § 16913. Registry requirements for sex offenders

(a) In general

A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

(b) Initial registration

The sex offender shall initially register -

(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or

(2) not later than 3 business dates after being sentence for that offense, if the sex offender is not sentenced to a term of imprisonment.

(c) Keeping the registration current

A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) of this section and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.

(d) Initial registration of sex offenders unable to comply with subsection (b) of this section

The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before July 27, 2006 or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section.

(e) State penalty for failure to comply

Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter.

42 U.S.C. §§ 16913(a)-(e).

Criminal Provision of the Sex Offender Registration and Notification Act (SORNA), in Pertinent Part:

18 U.S.C. § 2250. Failure to register

(a) In general.--Whoever--

(1) is required to register under the Sex Offender Registration and Notification Act;

(2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or

(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;

shall be fined under this title or imprisoned not more than 10 years, or both.

(b) Affirmative defense.--In a prosecution for a violation under subsection (a), it is an affirmative defense that-

(1) uncontrollable circumstances prevented the individual from complying;

(2) the individual did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and

(3) the individual complied as soon as such circumstances ceased to exist.

* * *

18 U.S.C.A. § 2250.

REPLY TO SOLICITOR GENERAL'S ARGUMENT

1. **Carr v. United States, __ U.S. __, 130 S.Ct. 2229 (2010) and the text of SORNA Contradict the Government's Argument That the Interim Rule did not Apply to Mr. Reynolds Because His Registration as a Sex Offender Pursuant to a State's System of Registration, Before Enactment of SORNA, Constitutes "Initial Registration" Under SORNA.**

The Solicitor General assumes in its brief in opposition, without citation to any authority, that registration under a particular state's registration law satisfies the "initial registration" requirement under the federal Sex Offender Registration and Notification Act (SORNA). Government Brief, pages 2-3. See 42 U.S.A. §§ 16913(b) and (d). The SORNA statute itself does not define "initial registration," and, in particular, does not equate registration as a sex offender within a state's registration system with "initial registration" under SORNA. See 42 U.S.C. § 16901 et seq. Yet, the government's argument that Mr. Reynolds has no standing under SORNA with respect to the Attorney General's Interim Rule depends upon this unsupported assumption. See Government Brief, pages 2-4, 6-8; Petition Appendix 1a, page 3.

To the contrary, as this Court recognized in Carr v. United States, __ U.S. __, 130 S.Ct. 2229 (2010), "[b]y its terms, the first element of [SORNA's criminal provision at 18 U.S.C.] § 2250(a) can only be satisfied when a person 'is required to register **under the Sex Offender Registration and Notification**

Act.'" 130 S.Ct. at 2235 (emphasis in original). The record below shows that Mr. Reynolds registered as a sex offender pursuant to the requirements of Missouri's law in 2005. Government Brief in Opposition, page 4; App. 60.[1] However, SORNA was not enacted until July 27, 2006. 42 U.S.C. § 16901. Therefore, Mr. Reynolds could not have initially registered "under SORNA" because he first registered after his release from state prison, which was at least a year before SORNA's enactment. 42 U.S.C. § 16913(b)(1). See 130 S.Ct. at 2236.

Mr. Reynolds has standing to contest the Attorney General's Interim Rule because he is a sex offender convicted before July 27, 2006 who could not initially register under SORNA. See 42 U.S.C. § 16913(d). For that reason alone certiorari should be granted.

2. Contrary to The Government's Claim That This Case Presents an Unimportant Issue, the Question of Whether the Interim Rule is Valid Affects Every Person Charged with Violating SORNA Before August 1, 2008 Who Was Convicted of a Sex Offense Prior to July 27, 2006 as well as Others, Which Warrants this Court's Review.

The Solicitor General contends that this Court should deny the petition because the question whether the Attorney General's Interim Rule (28 CFR § 72.3) is valid "is narrow, transitory,

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[1] The Appendix filed in the United States Court of Appeals for the Third Circuit is cited as "App." followed by the page number. The presentence report is cited as "PSR" followed by the paragraph or page number.

and of diminishing importance." Government Brief, page 14. As held by the United States Court of Appeals for the Sixth Circuit in two recent decisions, the Interim Rule was not properly promulgated, is invalid, and cannot support a prosecution. See United States v. Cain, 583 F.3d 408, 419 (6th Cir. 2010) and United States v. Utesch, 596 F.3d 302, 310 (6th Cir. 2010).[2] The government did not offer any accounting for how many people would be affected by a ruling in Mr. Reynolds' favor, but they appear to acknowledge that it is not likely to open a floodgate. Government's Brief, page 14.

Nonetheless, the issue of the Interim Rule's validity is important to Mr. Reynolds and untold others. As noted in Cain, the text of 42 U.S.C. § 16913(d) and the authority of the Attorney General to make rules, also apply to "offenders convicted after SORNA's full implementation who are nonetheless somehow unable to comply with its initial registration requirements," which expands the number of individuals affected by the Attorney General's rules. See 583 F.3d at 415.

As noted by this Court in Carr, the validity of the Attorney General's Interim Rule has split the circuits. See

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[2] The government did not seek certiorari from this Court in either Cain or Utesch. If the question of validity of the Interim Rule is to be reviewed, it will likely be when a person such as Mr. Reynolds seeks redress from this Court. Mr. Reynolds' case is indistinguishable from that in Utesch where the Sixth Circuit held that "the interim rule did not make SORNA effective against Utesch or any other defendants convicted before SORNA's enactment." 596 F.3d at 310.

United States v. Carr, __ U.S. __, 130 S.Ct. 2234 n.2 (2010). The government claims Mr. Reynolds' travel in September and October 2007, after the Interim Rule was issued, means that his case is not implicated by the circuit split. Government Brief, page 8. However, just a few pages later the government acknowledges that the issue of the validity of the Interim Rule affects people who violated SORNA as recently as August 1, 2008, long after the Interim Rule issued on February 28, 2007. Government's Brief, page 14. Therefore, Mr. Reynolds' case is well within the time frame of those affected by the circuit split he asks this Court to resolve.

3. The Government's Insistence that SORNA Applies "of Its Own Force" to All Sex Offenders, No Matter When Convicted, is Not Supported by the Text of the Statute or Logic.

The government characterizes SORNA as a statute that applies to all sex offenders, no matter when they were convicted, on the date it was enacted, of "its own force," and that the Interim Rule merely confirmed its application. See Government's Brief, pages 7, 8, 9, 10. However, the government's argument overlooks the fact that if SORNA automatically applied to all sex offenders on the date it was enacted, Congress would have had no reason to enact a provision that delegated authority to the Attorney General "to specify the applicability of the requirements of [SORNA] to sex offenders

convicted before July 27, 2006." See 42 U.S.C. § 16913(d).

The language in Section 16913(d) is obvious: "The Attorney General shall have the authority to specify the applicability of the requirements of **this subchapter** to sex offenders convicted before July 27, 2006." 42 U.S.C. § 16913(d)(emphasis added). The words "this subchapter" indisputably refer to Title 42, Chapter 151, Subchapter I of the United States Code. See pages 3 and 4 herein.

Therefore, contrary to the government's argument, SORNA did not apply of its own force, and Congress did not intend for it to apply of its own force. Instead, Congress delegated that task to the Attorney General, who improperly promulgated the Interim Rule. Furthermore, as stated in Utesch, "there was no properly promulgated regulation in place applying SORNA to [Mr. Reynolds] retroactively." See United States v. Utesch, 596 F.3d 302, 311 (6th Cir. 2010).[3] This Court should grant certiorari, vacate Mr. Reynolds' judgment and remand or accept his case for review.

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[3] The defendant in Utesch and Mr. Reynolds were indicted in November 2007. See App. 20. The Utesch court held the final SORNA guidelines were not enacted until August 1, 2008. See United States v. Utesch, 596 F.3d 302, 311 (6th Cir. 2010).

CONCLUSION

For all of the foregoing reasons, and those stated in his petition for writ of certiorari, Petitioner Billy Joe Reynolds, respectfully requests that this Court grant the petition for writ of certiorari, and accept this case for review. In the alternative, Mr. Reynolds requests that his petition be granted, his sentence vacated and his case remanded.

Respectfully submitted,

CANDACE CAIN
Assistant Federal Public Defender
Counsel for Petitioner,
Billy Joe Reynolds

Date: December 1, 2010

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petitioner's Reply Memorandum was sent first-class United States Mail this 1st day of December, 2010, to the following:

Marcia M. Waldron, Clerk
United States Court of Appeals
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Solicitor General of the United States
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United States Department of Justice
10th and Constitution Avenues
Washington, D.C. 20530

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Pittsburgh, Pennsylvania 15219

Billy Joe Reynolds
14819 South 980 West
Goodlin, Indiana 47948

CANDACE CAIN
Assistant Federal Public Defender
Counsel for Petitioner,
Billy Joe Reynolds

JOINT APPENDIX

RECORD AND BRIEFS

No. 10-6549

Supreme Court, U.S.
FILED
JAN 12 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

BILLY JOE REYNOLDS

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

JOINT APPENDIX

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Petition For Writ Of Certiorari Filed September 14, 2010
Certiorari Granted January 24, 2011

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U.S. District Court
Western District of Pennsylvania (Pittsburgh)
CRIMINAL DOCKET
FOR CASE #: 2:07-cr-00412-DWA-1

USA v. REYNOLDS Date Filed: 11/27/2007
Date Terminated: 11/24/2008

Date Filed	#	Docket Text
11/27/2007	1	SEALED INDICTMENT as to BILLY JOE REYNOLDS (1) count(s) 1. (Attachments: # 1 Certification and Notice for Filing Pretrial Motions # 2 Arraignment Plea # 3 Criminal Case Info Sheet) (tt) (Entered: 11/28/2007)
01/22/2008	14	MOTION to Unseal Case by USA as to BILLY JOE REYNOLDS. (lck,) (Entered: 01/22/2008)
01/22/2008	15	ORDER granting 14 Motion to Unseal Case as to BILLY JOE REYNOLDS (1). Signed by Judge Francis X. Caiazza on 1/22/08. (lck,) (Entered: 01/22/2008)
01/22/2008	16	Minute Entry for proceedings held before Judge Francis X. Caiazza : Arraignment as to BILLY JOE REYNOLDS (1) Count 1 held on 1/22/2008. Defendant pleads Not Guilty. (Tape #: 10:06-10:08) (lck,) (Entered: 01/22/2008)
05/07/2008	25	MOTION to Dismiss *Indictment* by BILLY JOE REYNOLDS. (Attachments: # 1 Proposed Order) (Finkelstein, Jay) (Entered: 05/07/2008)

05/07/2008	26	Brief in Support by BILLY JOE REYNOLDS re 25 MOTION to Dismiss *Indictment* (Finkelstein, Jay) (Entered: 05/07/2008)
05/21/2008	30	RESPONSE to Motion by USA as to BILLY JOE REYNOLDS re 25 MOTION to Dismiss *Indictment* (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit) (Haller, Craig) (Entered: 05/21/2008)
05/29/2008	33	RESPONSE to Motion by USA as to BILLY JOE REYNOLDS re 25 MOTION to Dismiss *Indictment Supplement to Response* (Haller, Craig) Wrong event selected. This document from public view and redocketed at 34. Modified on 5/30/2008. (ept) (Entered: 05/29/2008)
05/29/2008	34	Supplement filed by USA to 30 Response to Motion. (ept) (Entered: 05/30/2008)
06/03/2008	35	Minute Entry for proceedings held before Judge Donetta W. Ambrose: Conference as to BILLY JOE REYNOLDS re 25 Motion to Dismiss indictment held on 6/3/2008. Counsel to rely on their submissions. (Court Reporter: Julie Kienzle) (jlh) (Entered: 06/26/2008)
06/27/2008	36	MEMORANDUM ORDER denying 25 MOTION to Dismiss Indictment filed by BILLY JOE REYNOLDS. Jury Selection and Trial scheduled

for 7/21/2008 at 09:30 AM in Courtroom 3B before Donetta W. Ambrose. Proposed jury instructions and voir dire are due on July 7, 2008. Signed by Judge Donetta W. Ambrose on 6/27/08. (jlh) (Entered: 06/27/2008)

08/18/2008 39 Minute Entry for proceedings held before Judge Donetta W. Ambrose: Change of Plea Hearing as to BILLY JOE REYNOLDS held on 8/18/2008. (Court Reporter: Julie Kienzle) (jlh) (Entered: 08/18/2008)

08/18/2008 40 PLEA ENTERED: Defendant withdraws plea of not guilty and pleads Guilty to Count 1 as to BILLY JOE REYNOLDS. (jlh) (Entered: 08/18/2008)

08/18/2008 41 PLEA AGREEMENT as to BILLY JOE REYNOLDS. (jlh) (Entered: 08/18/2008)

08/18/2008 42 PRESENTENCE ORDER as to BILLY JOE REYNOLDS: Presentence Report due by 10/14/2008. Objection to Presentence Report due by 10/28/2008. Presentence Report Addendum due to this Court, defendant and counsel by 11/4/2008. Sentencing scheduled for 11/18/2008 at 10:30 AM in Courtroom 3B before Donetta W. Ambrose. Signed by Judge Donetta W. Ambrose on 8/18/08. (jlh) (Entered: 08/18/2008)

10/27/2008 47 OBJECTION / POSITION WITH RESPECT TO PRESENTENCE INVESTIGATION REPORT by USA as to

BILLY JOE REYNOLDS (Haller, Craig) (Entered: 10/27/2008)

10/31/2008 50 POSITION WITH RESPECT TO SENTENCING FACTORS by BILLY JOE REYNOLDS (Finkelstein, Jay) (Entered: 10/31/2008)

11/10/2008 51 RESPONSE by USA as to BILLY JOE REYNOLDS re 50 Position with respect to sentencing factors filed by BILLY JOE REYNOLDS (Haller, Craig) (Entered: 11/10/2008)

11/14/2008 52 SENTENCING MEMORANDUM by BILLY JOE REYNOLDS (Attachments: # 1 Exhibit A, # 2 Exhibit B) (Finkelstein, Jay) (Entered: 11/14/2008)

11/18/2008 54 Minute Entry for proceedings held before Judge Donetta W. Ambrose: Sentencing held on 11/18/2008 for BILLY JOE REYNOLDS (1), Count(s) 1. Imprisonment for a term of 18 months. Supervised release for a term of 3 years. Special assessment of $100.00. Fine waived. (Court Reporter: Patty Sherman) (jlh) (Entered: 11/24/2008)

11/24/2008 55 JUDGMENT as to BILLY JOE REYNOLDS (1), Count(s) 1. Imprisonment for a term of 18 months. Supervised release for a term of 3 years. Special assessment of $100.00. Fine waived. Signed by Judge Donetta W. Ambrose on 11/24/08. (jlh) (Entered: 11/24/2008)

12/08/2008 56 NOTICE OF APPEAL by BILLY JOE REYNOLDS re 55 Judgment Representing Attorney: Candace Cain. Court Reporter(s): Julie Kienzle, Patricia Sherman. The Clerk's Office hereby certifies the record and the docket sheet available through ECF to be the certified list in lieu of the record and/or the certified copy of the docket entries. The Transcript Purchase Order form will not be mailed to the parties. The form is available on the Court's internet site. (Cain, Candace) (Entered: 12/08/2008)

02/10/2009 62 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings as to BILLY JOE REYNOLDS held on January 22, 2008 before Judge Francis X. Caiazza. Court Reporter/Transcriber Roberta Swank, Telephone number 724-543-4996

***

(Swank, Roberta) (Entered: 02/10/2009)

02/10/2009 63 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings as to BILLY JOE REYNOLDS held on January 14, 2008 before Judge Robert C. Mitchell. Court Reporter/Transcriber Roberta Swank, Telephone number 724-543-4996

***

(Swank, Roberta) (Entered: 02/10/2009)

02/10/2009 64 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings as to BILLY JOE REYNOLDS held on 6-3-08 before Judge Ambrose. Court Reporter Julie Kienzle, Telephone number 412-261-6122.

***

(jak,) (Entered: 02/10/2009)

02/10/2009 65 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings as to BILLY JOE REYNOLDS held on 8-18-08 before Judge Donetta W. Ambrose. Court Reporter Julie Kienzle, Telephone number 412-261-6122.

***

(jak,) (Entered: 02/10/2009)

02/10/2009 66 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings as to BILLY JOE REYNOLDS held on November 18, 2008 before Judge Donetta Ambrose. Court Reporter Patricia W. Sherman, Telephone number 412-281-6855.

***

(pws,) Document not signed. Document removed from public view as it was redocketed at 67. Modified on 2/11/2009. (ept) (Entered: 02/10/2009)

02/11/2009 67 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings as to BILLY JOE REYNOLDS held on November 18, 2008 before Judge Donetta

Ambrose. Court Reporter Patricia W. Sherman. Telephone number 412-281-6855.

***

(pws,) (Entered: 02/11/2009)

05/14/2010 68 JUDGMENT of USCA (certified copy) as to BILLY JOE REYNOLDS re 56 Notice of Appeal – Final Judgment, Affirming judgment/order of the district court. Mandate will follow. (dwb3,) (Entered: 05/14/2010)

06/24/2010 69 MANDATE (Judgment) of USCA (certified copy) as to BILLY JOE REYNOLDS re 56 Notice of Appeal – Final Judgment, Affirming judgment/order of the district court. (Attachments: # 1 Opinion) (dwb3,) (Entered: 06/24/2010)

12/10/2010 70 PETITION ON SUPERVISED RELEASE – as to BILLY JOE REYNOLDS. (ept) (Entered: 12/13/2010)

12/13/2010 71 ORDER on Petition for Probation/Supervised Release Action as to BILLY JOE REYNOLDS that a Bench Warrant be issued and lodged as a detainer. Signed by Judge Donetta W. Ambrose on 12/13/2010. (jlh) (Entered: 12/13/2010)

General Docket
Third Circuit Court of Appeals

Court of Appeals
Docket #: 08-4747 **Docketed:** 12/15/2008
USA v. Billy Reynolds **Termed:** 05/14/2010

12/15/2008	CRIMINAL CASE DOCKETED. Notice filed by Billy Joe Reynolds. – [Edited 07/16/2009 by MGD] (DW)
05/07/2009	ECF FILER: ELECTRONIC APPENDIX on behalf of Appellant Billy Joe Reynolds, filed. Manner of Service: mail. Certificate of Service dated 05/07/2009. (CC)
05/07/2009	ECF FILER: ELECTRONIC BRIEF with Volume I of Appendix attached on behalf of Appellant Billy Joe Reynolds, filed. Certificate of Service dated 05/07/2009 by US mail. (CC)
05/11/2009	HARD COPY RECEIVED from Appellant Billy Joe Reynolds – Brief with Volume I of Appendix attached. Copies: 10. (SL)
05/11/2009	HARD COPY RECEIVED from Appellant Billy Joe Reynolds – Appendix. Copies: 4, Volumes: 2 (Volume I attached to Brief). (EMA)
06/01/2009	ECF FILER: ELECTRONIC BRIEF on behalf of Appellee USA, filed. Certificate of Service dated 06/01/2009 by US mail, email. (DJC)
06/01/2009	ECF FILER: ELECTRONIC APPENDIX on behalf of Appellee USA, filed. Manner of Service: mail. Certificate of Service dated 06/01/2009. (DJC)

06/01/2009 ECF FILER: SEALED ELECTRONIC PRESENTENCE REPORT on behalf of Appellee USA, filed. Certificate of Service dated 06/01/2009. This document will be SENT TO THE MERITS PANEL if/when applicable. (DJC)

06/03/2009 HARD COPY RECEIVED from Appellee USA – Brief. Copies: 10. (SL)

06/03/2009 HARD COPY RECEIVED from Appellee USA – Presentence Report. Copies: 4. (SL)

06/03/2009 HARD COPY RECEIVED from Appellee USA – Supplemental Appendix. Copies: 4. Volumes: 1 (MCW)

06/18/2009 ECF FILER: ELECTRONIC REPLY BRIEF on behalf of Appellant Billy Joe Reynolds, filed. Certificate of Service dated 06/18/2009 by US mail. (CC)

06/22/2009 HARD COPY RECEIVED from Appellant Billy Joe Reynolds – Reply Brief. Copies: 10. (SL)

10/22/2009 CLERK'S LETTER to counsel written at the direction of the Court. The Court directs that you be prepared to address at oral argument the split among the Courts of Appeal, recognized in United States v. Cain, No. 07-4535, 2009 WL 3255015, at *5 (6th Cir. Oct. 13, 2009), concerning the effective date of registration obligations imposed by SORNA. (Please see the document attached for full text.) (TLW)

10/27/2009 ARGUED on Tuesday, October 27, 2009 in Pittsburgh, PA, before SMITH, FISHER

and STAPLETON, Circuit Judges. Candace Cain arguing for Appellant Billy Joe Reynolds; Donovan J, Cocas arguing for Appellee United States of America. (CMH)

10/27/2009 COURT RESPONSE REQUEST AT ORAL ARGUMENT. The Court directed counsel to file a supplemental brief within 14 days of oral argument not to exceed 5 pages. (CMH)

10/30/2009 ECF FILER: Letter dated 10/30/2009, filed pursuant to Rule 28(j) from counsel for Appellee USA. This document will be SENT TO THE MERITS PANEL, if/when applicable. (DJC)

11/10/2009 ECF FILER: ELECTRONIC SUPPLEMENTAL LETTER BRIEF on behalf of Appellee USA, filed. Certificate of Service dated 11/10/2009 by email. (Docket text edited to include the word "Letter") – [Edited 11/12/2009 by LAL] (DJC)

11/10/2009 ECF FILER: ELECTRONIC SUPPLEMENTAL LETTER BRIEF on behalf of Appellant Billy Joe Reynolds, filed. Certificate of Service dated 11/10/2009 by US mail. (Docket text edited to include the word "Letter") – [Edited 11/12/2009 by LAL] (CC)

11/12/2009 ECF FILER: CORRECTED Letter dated 11/12/2009, filed pursuant to Rule 28(j) from counsel for Appellee USA. This document will be SENT TO THE MERITS PANEL, if/when applicable. (DJC)

03/03/2010	ECF FILER: Letter dated 03/03/2010, filed pursuant to Rule 28(j) from counsel for Appellant Billy Joe Reynolds. This document will be SENT TO THE MERITS PANEL, if/when applicable. (CC)
03/03/2010	ECF FILER: Letter dated 03/03/2010, filed pursuant to Rule 28(j) from counsel for Appellee USA. This document will be SENT TO THE MERITS PANEL, if/when applicable. (DJC)
05/06/2010	ECF FILER: Letter dated 05/06/2010, filed pursuant to Rule 28(j) from counsel for Appellee USA. This document will be SENT TO THE MERITS PANEL, if/when applicable. (DJC)
05/07/2010	ECF FILER: Response filed by Appellant Billy Joe Reynolds to Rule 28(j) letter. Certificate of Service dated 05/07/2010. This document will be SENT TO THE MERITS PANEL, if/when applicable. (CC)
05/14/2010	NOT PRECEDENTIAL OPINION Coram: SMITH, FISHER and STAPLETON, Circuit Judges. Total Pages: 3. Judge: SMITH Authoring. (DW)
05/14/2010	JUDGMENT, Affirmed. (DW)
05/28/2010	ECF FILER: Petition filed by Appellant Billy Joe Reynolds for Rehearing before original panel and the court en banc. Certificate of Service dated 05/28/2010. (CC)
06/16/2010	ORDER (MCKEE, Chief Judge, SLOVITER, SCIRICA, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES,

JORDAN, HARDIMAN, GREENAWAY, VANASKIE and *STAPLETON, Circuit Judges) denying for Panel and En Banc Rehearing filed by Appellant Billy Joe Reynolds. D. Brooks Smith, Authoring Judge.* The vote of the Honorable Walter K. Stapleton, Senior Judge for the Third Circuit Court of Appeals, is limited to panel rehearing., filed. (DW)

06/24/2010 MANDATE ISSUED, filed. (DW)

09/16/2010 Copy of Petition for Writ of Certiorari and Motion for Leave to Proceed In Forma Pauperis to U.S. Supreme Court received from Billy Joe Reynolds. * * * RECEIVED FOR THE INFORMATION OF THE COURT * * * (DW)

01/26/2011 NOTICE from U.S. Supreme Court. Petition for Writ of Certiorari filed by Billy Joe Reynolds on 09/14/2010, Supreme Court Case No. 10-6549. (NR)

01/26/2011 NOTICE of U.S. Supreme Court disposition at No. 10-6549, Petition for Writ of Ceriorari [sic] filed by Billy Joe Reynolds granted on 01/24/2011. (NR)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	Criminal No. 07-412
	)	(18 U.S.C. § 2250(a))
v.	)	**(UNDER SEAL)**
BILLY JOE REYNOLDS	)	

INDICTMENT

(Filed Nov. 27, 2007)

The grand jury charges:

Between on or about September 16, 2007, and on or about October 16, 2007, in the Western District of Pennsylvania, the defendant, BILLY JOE REYNOLDS, who was required to register under the Sex Offender Registration and Notification Act after having been convicted in 2001 in the Circuit Court of Dunklin County, Missouri, at case number 01CR761326-01 of the felony sex offense of Statutory Sodomy in the 2nd Degree, traveled in interstate commerce and knowingly failed to register and update a registration as required by the Sex Offender Registration and Notification Act.

In violation of Title 18, United States Code, Section 2250(a).

A True Bill,

_____
Foreperson

/s/ Robert S. Cessar
MARY BETH BUCHANAN
United States Attorney
PA ID No. 50254

GOVERNMENT EXHIBIT 2

(Filed May 21, 2008)

United States District Court for the Western District of Pennsylvania

[Title Omitted In Printing]

Due Back 09/12/05

[SEAL] MISSOURI STATE HIGHWAY PATROL **MISSOURI OFFENDER REGISTRATION NOTIFICATION** **STATUTE 589.400-589.425 RSMo** SHP-431C 02/05	STATEMENT VERIFICATION 90 DAY VERIFICATION REQUIRED ☒ YES ☐ NO ☐ PERSISTENT/PREDATORY OFFENDER

NAME (LAST, FIRST, MI, JR/SR/III) Reynolds, Billy Joe							RISK LEVEL	
☒ MALE ☐ FEMALE	DATE OF BIRTH [redacted] 66	SOCIAL SECURITY NO. [redacted]	RACE White	HEIGHT 5'10	WEIGHT 210	EYE COLOR Blue	HAIR COLOR Brown	

INTENDED OR CURRENT ADDRESS (STREET, APT.) 1621 N. first St.	CITY St. louis	COUNTY CODE 1 1 6	STATE MO	ZIP 63102	GEO CODE

ALIAS NAME N/A	PHONE NO. (314) 877-0300	MOSOP COMPLETED ☐ YES ☒ NO ☐ NA	DATE

SID NO.	FBI NO.	PROBATION/PAROLE NO.	REGISTER NO.	INTERSTATE COMPACT ☐ YES ☒ NO
M001180081	F01066037	1066037		

NAME OF EMERGENCY CONTACT OR SOMEONE LIVING WITH YOU Betty Reynolds	RELATIONSHIP MOM	PHONE NO. [redacted]

ADDRESS (STREET, APT.) 1419 So 980W	CITY Goodland	STATE In	ZIP 47948

EMPLOYMENT/SCHOOL INFORMATION

EMPLOYER AND/OR SCHOOL NAME TBO	COUNTY CODE	PHONE NO. ( )

EMPLOYER AND/OR SCHOOL ADDRESS (STREET, APT.)	CITY	STATE	ZIP	GEO CODE

OFFENSE INFORMATION

(1) OFFENSE REQUIRING REGISTRATION	DATE OF OFFENSE	CITY, COUNTY, STATE OF OFFENSE
Statutory Sodomy 2nd	7/19/01	~~De~~ Kennett Dunklin, MO

CITY, COUNTY, STATE OF CONVICTION/PLEA	DATE OF CONVICTION/ PLEA	CONFINEMENT RELEASE DATE	PROB/PAROLE COMPLETION DATE
Kennett Dunklin, MO	10-10-01	7-21-05	7-19-08

VICTIM SEX ☐ M ☒ F	VICTIM RACE	VICTIM AGE	VICTIM RELATIONSHIP	BRIEF DESCRIPTION OF OFFENSE/MODUS OPERANDI
	[redacted]	7	[redacted]	Forced her to perform oral sex Fondled victims vagina (skin to skin) on him

(2) OFFENSE REQUIRING REGISTRATION	DATE OF OFFENSE	CITY, COUNTY, STATE OF OFFENSE

CITY, COUNTY, STATE OF CONVICTION/PLEA	DATE OF CONVICTION/ PLEA	CONFINEMENT RELEASE DATE	PROB/PAROLE COMPLETION DATE

VICTIM SEX ☐ M ☐ F	VICTIM RACE	VICTIM AGE	VICTIM RELATIONSHIP	BRIEF DESCRIPTION OF OFFENSE/MODUS OPERANDI

16

ACKNOWLEDGMENT OF REQUIREMENTS

As an offender who is required to register under Section 589.400 RSMo., I hereby acknowledge that I have been informed of the following.

Initial each box after reading.

BR **The first time registering** as an offender I must register in person within 10 days of coming into a jurisdiction, with the Chief Law Enforcement Official of that jurisdiction.

BR **If I move to another state**, I must inform the Chief Law Enforcement Official where I am currently registered, where I plan to move. I must also meet that state's registration requirements.

BR **I understand that I cannot live within 1,000 feet of a public or private school, or child care facility.** I must notify the Chief Law Enforcement Official within a week if one is built or opened.

BR Anytime I **change my residence or address**, I must inform, in person within 10 days, the Chief Law Enforcement Officials of the current and prior jurisdictions, of the change.

BR **Failure to comply** with the offender registration requirements, is a criminal offense.

BR **90 day and annual address/statement verification** of the Offender Registration requirements have been explained to me.

I have read or had read to me and understand the above offender registration requirements.

OFFENDER'S SIGNATURE	DATE
X Billy Reynolds	8-2-05

NOTIFYING AGENCY

AGENCY NAME	ADDRESS (STREET, P.O. BOX)	CITY
SLCRC	1621 N. 1st	St. louis

ZIP	COUNTY CODE	SIGNATURE OF NOTIFYING AGENCY OFFICIAL	AGENCY PHONE NO.
63102	1 1 6	Ric [Illegible] 48704	(314) 877-0300

REGISTERING AGENCY

AGENCY NAME	ADDRESS (STREET, P.O. BOX)	CITY
SLMPD	1200 CLARK	St. Louis

ZIP	COUNTY CODE	SIGNATURE OF REGISTERING OFFICIAL	AGENCY PHONE NO.	DATE
63103	1 1 6	Det. [Illegible] Severino	(314) 444-5338	8/3/05

REGISTERING AGENCY

DISTRIBUTION: WHITE-MSHP CANARY-CIFO PINK-NOTIFYING AGENCY GOLDENROD-OFFENDER

GOVERNMENT EXHIBIT 3

(Filed May 21, 2008)

United States District Court for the Western District of Pennsylvania

[Title Omitted In Printing]

Mail completed form to: **Missouri State Highway Patrol, Criminal Records and Identification Division, P.O. Box 9500, Jefferson City, MO 65102. Phone (573) 526-6153**

EMPLOYMENT/SCHOOL INFORMATION

EMPLOYER AND/OR SCHOOL NAME	COUNTY CODE	PHONE NO. ( )

EMPLOYER AND/OR SCHOOL ADDRESS (STREET, APT.)	CITY	STATE	ZIP	GEO CODE

OFFENSE INFORMATION

(1) OFFENSE REQUIRING REGISTRATION	DATE OF OFFENSE	CITY, COUNTY, STATE OF OFFENSE
STAT SODOMY 2ND	7/19/01	Kennett Dunklin MO

CITY, COUNTY, STATE OF CONVICTION/PLEA	DATE OF CONVICTION/PLEA	CONFINEMENT RELEASE DATE	PROB/PAROLE COMPLETION DATE
KENNETT, DUNKLIN MO	10/10/01		

VICTIM SEX	VICTIM RACE	VICTIM AGE	VICTIM RELATIONSHIP	BRIEF DESCRIPTION OF OFFENSE/MODUS OPERANDI
☐ M ☒ F	[redacted]	7	[redacted]	Fondled victims vagina forced to perform oral sex

(2) OFFENSE REQUIRING REGISTRATION	DATE OF OFFENSE	CITY, COUNTY, STATE OF OFFENSE

CITY, COUNTY, STATE OF CONVICTION/PLEA	DATE OF CONVICTION/ PLEA	CONFINEMENT RELEASE DATE	PROB/PAROLE COMPLETION DATE

VICTIM SEX	VICTIM RACE	VICTIM AGE	VICTIM RELATIONSHIP	BRIEF DESCRIPTION OF OFFENSE/MODUS OPERANDI
☐ M ☐ F				

ACKNOWLEDGMENT OF REQUIREMENTS

As an offender who is required to register under Section 589.400 RSMo., I hereby acknowledge that I have been informed of the following. **Initial each box after reading.**

BR I must contact the county law enforcement agency every ninety days to verify the information contained in my statement if:
I am a registered predatory, or persistent sexual offender.
or
I am registered for a crime where the victim was less than 18 years of age.
or
I have been found guilty or pled guilty of failing to register as an offender.

BR **If I move to another state,** I must inform the Chief Law Enforcement Official where I am currently registered, where I plan to relocate. I understand if I move out of state, I must also meet that state's registration requirements.

BR **Anytime I change my residence or address,** I must inform, in person within 10 days, the Chief Law Enforcement Officials of the current and prior jurisdictions, of the change.

BR I must report annually in person in the month of my birth to the Chief Law Enforcement Officials to verify the information contained in my statement.

BR **Failure to comply** with the offender registration requirements, is a criminal offense.

BR If I am attending or employed on a full or part-time basis at a school of higher education, I must inform the Chief Law Enforcement Official where I am currently registered.

I have read or had read to me and understand the above offender registration requirements.

OFFENDER'S SIGNATURE	DATE
X Billy Reynolds	8-3-05

REGISTERING AGENCY NAME	AGENCY OR	AGENCY PHONE NO.
SLMPD	MOSPD0000	(314) 444-5338

ADDRESS (STREET, P.O. BOX)	CITY, STATE, ZIP
1200 CLARK	St. Louis MO 63103

SIGNATURE OF REGISTERING OFFICIAL	DATE
Severino	8-3-05

(Filed May 21, 2008)

United States District Court for the Western District of Pennsylvania

[Title Omitted In Printing]

Due Back 06/19/07

SHP-428C 07/06 [SEAL] MISSOURI STATE HIGHWAY PATROL **MISSOURI OFFENDER REGISTRATION** **CHANGE OF ADDRESS** Statute 589.400-589.425 RSMo	☒ VERIFICATION ☐ NOTIFICATION ☒ 90 Day ☐ Semi-Annual ☐ CHANGED ADDRESS WITHIN COUNTY ☐ MOVED OUT OF COUNTRY ☐ To Other County ☐ To Other State

EFFECTIVE DATE	SID NO.	FBI NO.	DRIVER'S LICENSE/ID NO.
3/20/07	MO01180081	F01066037	S200034044

OFFENDER NAME	DATE	SOCIAL SECURITY NO.
REYNOLDS, BILLY JOE	[redacted]/66	[redacted]
ALIAS NAME	ALIAS DATE OF BIRTH	ALIAS SOCIAL SECURITY NO.
ALIAS NAME	ALIAS DATE OF BIRTH	ALIAS SOCIAL SECURITY NO.

ADDRESS INFORMATION

OLD ADDRESS	CITY	COUNTY CODE	STATE	ZIP	GEO CODE
205 N. 9th #531	ST. LOUIS	1 1 6	MO	63101	
NEW ADDRESS	CITY	COUNTY CODE	STATE	ZIP	GEO CODE

SUPPLEMENTAL ADDRESS INFORMATION

☐ RESIDE ☒ WORK ☐ SCHOOL ☐ TEMP	EMPLOYER AND/OR SCHOOL NAME	PHONE NO.
	Community Rehab & Restoration L.L.C.	(314) 359-5165

ADDRESS (STREET, APT.)	CITY	COUNTY CODE	STATE	ZIP	GEO CODE
P.O. Box 11814	Clayton	0 9 5	MO	63105	

☐ RESIDE ☐ WORK ☐ SCHOOL ☐ TEMP	EMPLOYER AND/OR SCHOOL NAME	PHONE NO.
		( )

ADDRESS (STREET, APT.)	CITY	COUNTY CODE	STATE	ZIP	GEO CODE

☐ RESIDE ☐ WORK ☐ SCHOOL ☐ TEMP	EMPLOYER AND/OR SCHOOL NAME	PHONE NO.
		( )

ADDRESS (STREET, APT.)	CITY	COUNTY CODE	STATE	ZIP	GEO CODE

VEHICLE INFORMATION

☐ OWNED ☐ OPERATED	YR	VIN	MAKE	MODEL	COLOR(S)
VEHICLE TYPE		LICENSE PLATE NUMBER		STATE	
☐ OWNED ☐ OPERATED	YR	VIN	MAKE	MODEL	COLOR(S)
VEHICLE TYPE		LICENSE PLATE NUMBER		STATE	
☐ OWNED ☐ OPERATED	YR	VIN	MAKE	MODEL	COLOR(S)
VEHICLE TYPE		LICENSE PLATE NUMBER		STATE	

OFFENSE INFORMATION					
ADDITIONAL OFFENSE REQUIRING REGISTRATION			DATE OF OFFENSE		CITY, COUNTY, STATE OF OFFENSE
CITY, COUNTY, STATE OF CONVICTION/PLEA				DATE OF CONVICTION/PLEA	
VICTIM SEX ☐ M ☐ F	VICTIM RACE	VICTIM AGE	VICTIM RELATIONSHIP	BRIEF DESCRIPTION OF OFFENSE/MODUS OPERANDI	
PG/FG/CONVICTED OF FAILING TO REGISTER? ☐ YES ☐ NO			PERSISTENT/PREDATORY OFFENDER ☐ YES ☐ NO		ELECTRONIC MONITORING FOR LIFE? ☐ YES ☐ NO
CONFINEMENT RELEASE DATE	PROBATION, PAROLE DATE		DMH RELEASE DATE		PROBATION/PAROLE COMPLETE DATE
OFFENDER SIGNATURE X Billy Reynolds				PHONE NO. (314) 601-1155	DATE 3/20/07
SUBMITTING AGENCY NAME SLMPD			SIGNATURE Severino	PHONE NO. (314) 444-5338	DATE 3/20/07
AGENCY RECEIVING OFFENDER			SIGNATURE	PHONE NO. ( )	DATE

GOVERNMENT EXHIBIT 2

(Filed May 21, 2008)

United States District Court for the Western District of Pennsylvania

[Title Omitted In Printing]

(2) OFFENSE REQUIRING REGISTRATION	DATE OF OFFENSE	CITY, COUNTY, STATE OF OFFENSE

CITY, COUNTY, STATE OF CONVICTION/PLEA	DATE OF CONVICTION/ PLEA	CONFINE-MENT RE-LEASE DATE	PROB/PAROLE COMPLETION DATE

VICTIM SEX ☐ M ☑ F	VICTIM RACE	VICTIM AGE	VICTIM RELATIONSHIP	BRIEF DESCRIPTION OF OFFENSE/MODUS OPERANDI

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

UNITED STATES OF AMERICA,	)	
vs.	)	CR 7-412
BILLY JOE REYNOLDS,	)	
Defendant.	)	

MEMORANDUM ORDER

(Filed Jun. 27, 2008)

Defendant, Billy Joe Reynolds, has filed a Motion to Dismiss Indictment (Doc. No. 25). After careful consideration of all submissions from the defendant and the government, the motion is denied.

Initially, defendant argues that Congress's delegation to the Attorney General of the decision of whether the Sex offender Registration and Notification Act ("SORNA") would apply retroactively to persons, such as defendant, convicted prior to its July 27, 2006, enactment, violates the legislative power vested in Congress under Article I, Sections 1 and 8 of the United States Constitution. I decline to accept defendant's argument and, rather, find that Congress's request for assistance from the Attorney was not an unconstitutional delegation of legislative authority.

Here, defendant was convicted of a sex offense on October 10, 2001, prior to SORNA' s enactment on

July 27, 2006, and prosecuted for conduct occurring between September 16, 2007, and October 16, 2007, dates subsequent to the publication of the Attorney General's interim rule of February 28, 2007, concerning the retroactive application of SORNA. Therefore, defendant was required to register as a sex offender. See U.S. v. Hinnen, 487 F. Supp. 2d 747 (W.D.Va. 2007)_ for a persuasive discussion of legislative history and Congressional intent in SORNA's promulgation.

Defendant next argues that SORNA violates the Commerce Clause. I disagree. SORNA contains a jurisdictional predicate requiring interstate or foreign travel. Because SORNA requires the travel by an individual across state lines, it has, at least, a de minimus effect on interstate commerce and is a proper exercise of Congressional authority under the Commerce Clause.

Defendant next argues that SORNA violates the Ex Post Facto Clause. Again, I disagree. Here, defendant is being prosecuted for an act (failure to register) that occurred after SORNA's effective date.

Defendant also complains that SORNA violates his procedural and substantive due process rights. First, procedural due process does not require that a sex offender registration system premised upon past convictions of sex offenses provide the defendant the right to collaterally attack those past convictions or demonstrate that the defendant is not a danger to the

public. Connecticut Dept. Of Public Safety v. Doe, 538 U.S. 1, 7-8 (2003).

Because defendant's substantive due process argument relies upon his argument that he is being deprived of procedural due process, it, too, must fail.

In addition, defendant's alleged ignorance of SORNA is immaterial, since defendant was clearly aware of state registration obligations.

Defendant next argues that the Attorney General's publication of the interim rule clarifying SORNA's retroactivity violated the Administrative Procedures Act in that the interim rule was made immediately effective without a notice and comment period. Those provisions of the Act, however, requiring notice and comment contain a "good cause" exception. Here, the Attorney General appropriately determined that the prompt registration of sex offenders and the danger posed by unregistered offenders was good cause to waive the notice and comment period.

Finally, defendant argues that SORNA impermissibly encroaches upon a state's power, thereby violating the Tenth Amendment. This argument also lacks merit. Defendant has no standing to make such a challenge and does not, in any case, explain how any state is being forced to comply with SORNA against the will of its people.

Therefore, this 27th day of June, 2008, it is Ordered that defendant's Motion to Dismiss (Doc. No. 25) is Denied.

Trial is scheduled for July 21, 2008, at 9:30 AM in Courtroom 3B. Proposed jury instructions and voir dire are due on July 7, 2008.

By the Court,

s/ Donetta W. Ambrose

Donetta W. Ambrose

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

UNITED STATES
OF AMERICA,

vs. Criminal No. 07-412

BILLY JOE REYNOLDS,

Defendant.

Transcript of Change of Plea Proceedings on Monday, August 18, 2008, United States District Court, Pittsburgh, Pennsylvania, before Donetta W. Ambrose, Chief District Judge.

APPEARANCES:

For the Government: Craig W. Haller, Esq.
Assistant U.S. Attorney
400 USPO and Courthouse
700 Grant Street
Pittsburgh, PA 15219

For the Defendant: Jay J. Finkelstein, Esq.
Federal Public Defender's Office
1001 Liberty Avenue
1450 Liberty Center
Pittsburgh, PA 15222

Court Reporter: Juliann A. Kienzle, RMR, CRR
Fifth Floor USPO & Courthouse
700 Grant Street
Pittsburgh, PA 15219
(412) 261-6122

Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

[2] (Proceedings held in open court; Monday, August 18, 2008.)

THE COURT: We have scheduled this morning a change of plea hearing in the case of the United States of America against Billy Joe Reynolds.

Mr. Reynolds, I have been informed that you wish to change the plea you previously entered in this case to a plea of guilty; is that correct?

THE DEFENDANT: Yes.

THE COURT: Before accepting your guilty plea, there are a number of questions that I'm going to ask you to make certain that your plea is valid. If you do not understand any question I ask you, please let me know and I will explain it to you. If at any time you wish to speak with your attorney, let me know and I will give you as much time as you need to speak with him. I give you these instructions because it is essential to a valid plea that you understand every question before you answer.

Would you please stand and raise your right hand.

(Administration of the oath.)

THE COURT: Do you understand that now that you have been sworn, your answers to my questions are subject to penalties for perjury or making false statements if you do not answer truthfully?

THE DEFENDANT: Yes.

THE COURT: Would you please state your full name.

[3] THE DEFENDANT: Billy Joe Reynolds.

THE COURT: How old are you, sir?

THE DEFENDANT: Forty-three.

THE COURT: How far did you go in school?

THE DEFENDANT: Graduated.

THE COURT: Do you have any difficulty reading, writing or understanding the English language?

THE DEFENDANT: Yes.

THE COURT: What kind of difficulty?

THE DEFENDANT: Reading and writing.

MR. FINKELSTEIN: Your Honor, he's been in Special Ed. He can't really read or write, Your Honor.

THE COURT: Have you been able to communicate with Mr. Finkelstein though?

THE DEFENDANT: Yes.

THE COURT: Have you had any difficulty?

THE DEFENDANT: No.

THE COURT: Have you understood everything he said to you?

THE DEFENDANT: Yes.

THE COURT: Has he reviewed everything with you?

THE DEFENDANT: Yes.

THE COURT: Mr. Finkelstein, would you agree with Mr. Reynolds that you've had no difficulty communicating?

MR. FINKELSTEIN: I would, Your Honor. What I've [4] done is I have read everything as opposed to giving it to him to read, so we have gone over everything and he does understand.

THE COURT: Have you taken any drugs or medicine or drug any alcohol in the past 24 hours?

THE DEFENDANT: No.

THE COURT: Are you now or have you recently been under the care of physician?

THE DEFENDANT: I'm taking ibuprofen for migraines.

THE COURT: Does that affect your ability to understand what you're doing here today?

THE DEFENDANT: No.

THE COURT: Are you now or have you recently been hospitalized or treated for narcotic addiction?

THE DEFENDANT: No.

THE COURT: Do you understand what is happening here today? Previously, you entered a plea of not guilty to the charge contained in the indictment and you are here today to change that to a plea of guilty.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Does either counsel have any doubt about the competence of Mr. Reynolds to plead guilty at this time to the charge in the indictment?

THE DEFENDANT: No, Your Honor.

* * *

[16] by the plea agreement, you or the government may have the right to appeal any sentence that I impose?

THE DEFENDANT: Yes.

THE COURT: And do you understand that parole has been abolished and if you are sentenced to a term of imprisonment, you will not be released on parole?

THE DEFENDANT: Yes.

THE COURT: Do you understand if your sentence is more severe than you expected, you will still be bound by your guilty plea and you will have no right to withdraw it?

THE DEFENDANT: Yes.

THE COURT: Except for your discussions with your attorney about the advisory guidelines, has anyone made any prediction or promise to you about what your actual sentence will be?

THE DEFENDANT: No.

THE COURT: Has anything I have said here today suggested to you what your actual sentence will be?

THE DEFENDANT: No.

THE COURT: Have you been instructed by anyone to respond untruthfully to any question about a promised sentence?

THE DEFENDANT: No.

THE COURT: Mr. Reynolds, did you between on or about September 16, 2007, and on or about October 16, 2007, in [17] the Western District of Pennsylvania, were you at that time an individual who was required to register under the Sex Offender Registration and Notification Act because you had been convicted in 2001 in the Circuit Court of Dunklin County, Missouri, at case number 01CR761326-01 of the felony sex offense of statutory sodomy in the second degree. Did you thereafter

travel in interstate commerce between September 16, 2007, and October 16, 2007, and knowingly fail to register and update a registration as required by the sex offender registration and notification act.

Did you do that?

THE DEFENDANT: Yes.

THE COURT: I'm going to ask Mr. Haller to summarize the government's evidence about this charge.

MR. HALLER: Yes, Your Honor.

Your Honor, the United States would expect to be able to present evidence of the following if this case were to go to trial.

Mr. Reynolds was convicted of the felony sex offense of statutory sodomy in the second degree in 2001 in the Circuit Court of Dunklin County, Missouri.

Mr. Reynolds was then sentenced to incarceration in the Missouri state prison system. Upon his release, he registered as a sex offender in Missouri. He updated and verified his registration as required on several occasions. [18] He signed several forms notifying him of his registration obligations, including his registration obligation if he moved to another jurisdiction.

Approximately two and a half years ago, Mr. Reynolds began corresponding with Melissa Hall of

Washington, Pennsylvania, via a cell phone chat line called C-Lounge. Hall turned 20 in September 2007.

On September 16, 2007, while still on parole in Missouri, Mr. Reynolds boarded an AmTrak train and left Missouri. He traveled to Chicago and boarded another Amtrak train bound for Pittsburgh. Melissa Hall and her mother picked Reynolds up and drove him to Washington, Pennsylvania.

Mr. Reynolds got a job as a deep fryer at Max and Erma's restaurant in Washington and began living with the Halls at the residence. He failed to comply with Missouri sex offender registration requirements when he left Missouri for Pennsylvania. In addition, he failed to register in Pennsylvania after arriving here on September 17, 2007.

During a subsequent Mirandized interview following Mr. Reynolds's arrest, Mr. Reynolds admitted he did not register as a sex offender in Pennsylvania. He also admitted he knew he should have.

THE COURT: Mr. Reynolds, you heard what Mr. Haller just said to summarize what the government contends you did, did you not?

[19] THE DEFENDANT: Yes.

THE COURT: Did you understand what he said?

THE DEFENDANT: Yes.

THE COURT: Do you agree that what he said correctly describes your conduct?

MR. FINKELSTEIN: Your Honor, if I may, mindful of the fact that this is a conditional plea and this will be I guess decided by the Third Circuit, we will concede the fact that Mr. Reynolds did not register.

THE COURT: Is that correct, Mr. Reynolds? You agree that you did not?

THE DEFENDANT: Yes.

THE COURT: Do you still want to plead guilty?

THE DEFENDANT: Yes.

THE COURT: Mr. Finkelstein, is it your advice that he plead guilty?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Mr. Reynolds, because you acknowledge that you are, in fact, guilty as charged in Count One, because you know about your right to trial, because you know the maximum penalty that could be imposed if you were convicted of this offense after trial, and because you are voluntarily pleading guilty, I will accept your guilty plea and enter a judgment of guilty on your plea to Count One of indictment No. 7-412.

* * *

GOVERNMENT EXHIBIT

CASE NO. 07-412

EXHIBIT NO. 1

United States District Court for the Western District of Pennsylvania

[Title Omitted In Printing]

(Filed Aug. 18, 2008)

U.S. Department of Justice

United States Attorney
Western District of Pennsylvania

U.S. Post Office & Courthouse
700 Grant Street
Suite 4000
Pittsburgh, Pennsylvania 15219 *412/644-3500*

July 3, 2008

Jay J. Finkelstein
Federal Public Defender's Office
1001 Liberty Avenue
Suite 1450
Pittsburgh, PA 15222

Re: United States of America v.
Billy Joe Reynolds
Criminal No. 07-412

Dear Mr. Finkelstein:

This letter sets forth the agreement by which your client, Billy Joe Reynolds, will enter a plea of guilty in the above-captioned case. The letter represents the full and complete agreement between Billy Joe

Reynolds and the United States Attorney for the Western District of Pennsylvania. The agreement does not apply to or bind any other federal, state, or local prosecuting authority.

Upon entering a plea of guilty, Billy Joe Reynolds will be sentenced under the Sentencing Reform Act, 18 U.S.C. §3551, *et seq.* and 28 U.S.C. §991, *et seq.* The Sentencing Guidelines promulgated by the United States Sentencing Commission will be considered by the Court in imposing sentence. The facts relevant to sentencing shall be determined initially by the United States Probation Office and finally by the United States District Court by a preponderance of the evidence.

A. The defendant, Billy Joe Reynolds, agrees to the following:

1. He will enter a plea of guilty to Count One of the Indictment at Criminal No. 07-412, charging him with violating Title 18, United States Code, Section 2250(a), pursuant to Rule 11 of the Federal Rules of Criminal Procedure.

2. At the time Billy Joe Reynolds enters his plea of guilty, he will deposit a special assessment of $100.00 in the form of cash, or check or money order payable to "Clerk, U.S. District Court". In the event that sentence is not ultimately imposed, the special assessment deposit will be returned.

3. As required by 18 U.S.C. §§3563(a)(8) and 3583(d), and the Sex Offender Registration

and Notification Act (SORNA, 42 U.S.C. §16901 *et seq.*), Billy Joe Reynolds agrees to report the address where he will reside and any subsequent change of residence to the probation officer responsible for his supervision, and further agrees to register as a convicted sex offender under the law of any state in which he resides, is employed, carries on a vocation, or is a student.

4. Billy Joe Reynolds waives the right to take a direct appeal from his conviction or sentence under 28 U.S.C. § 1291 or 18 U.S.C. § 3742, subject to the following exceptions:

   (a) If the United States appeals from the sentence, Billy Joe Reynolds may take a direct appeal from the sentence.

   (b) If (1) the sentence exceeds the applicable statutory limits set forth in the United States Code or (2) the sentence unreasonably exceeds the guideline range determined by the Court under the Sentencing Guidelines, Billy Joe Reynolds may take a direct appeal from the sentence.

   (c) As a condition of his guilty plea, Billy Joe Reynolds may take a direct appeal from his conviction limited to the following issues: the issues specifically raised in his "Motion to Dismiss Indictment" (Document 25, filed 05/07/2008). If Billy Joe Reynolds takes a direct appeal raising any or all of these issues and prevails in the appeal on any of these issues, he may withdraw his plea of

guilty. If he does not take a direct appeal or does not prevail on any of these issues, the plea of guilty shall stand.

The foregoing reservations of the right to appeal on the basis of specified issues do not include the right to raise issues other than those specified.

Billy Joe Reynolds further waives the right to file a motion to vacate sentence, under 28 U.S.C. § 2255, attacking his conviction or sentence, and the right to file any other collateral proceeding attacking his conviction or sentence.

B. In consideration of and entirely contingent upon the provisions of Parts A and C of this agreement, the United States Attorney for the Western District of Pennsylvania agrees to the following:

1. The United States Attorney retains the right of allocution at the time of sentencing to advise the Sentencing Court of the full nature and extent of the involvement of Billy Joe Reynolds in the offense charged in the Indictment and of any other matters relevant to the imposition of a fair and just sentence.

2. Prior to sentencing, the United States Attorney will, orally or in writing, move that, pursuant to §3E1.1 of the Sentencing Guidelines, the Court reduce the offense level by 3 levels for acceptance of responsibility, if the offense level prior to application of §3E1.1 is 16 or greater, on the basis that Billy Joe Reynolds timely notified authorities of his intention to

enter a plea of guilty, thereby permitting the United States to avoid preparing for trial and permitting the Court to allocate its resources efficiently.

3. The United States Attorney will take any position she deems appropriate in the course of any appeals from the sentence or in response to any post-sentence motions.

C. Billy Joe Reynolds and the United States Attorney further understand and agree to the following:

1. The penalty that may be imposed upon Billy Joe Reynolds is:

   (a) A term of imprisonment of ten (10) years;

   (b) A fine of $250,000;

   (c) A term of supervised release of three (3) years;

   (d) A special assessment under 18 U.S.C. §3013 of $100;

2. This agreement does not preclude the United States from pursuing any civil or administrative remedies against Billy Joe Reynolds or his property.

This letter sets forth the full and complete terms and conditions of the agreement between Billy Joe Reynolds and the United States Attorney for the Western District of Pennsylvania, and there are no

other agreements, promises, terms or conditions, express or implied.

Very truly yours,

/s/ Mary Beth Buchanan
MARY BETH BUCHANAN
United States Attorney

I have received this letter from my attorney, Jay J. Finkelstein, Esquire, have read it and discussed it with him, and I hereby accept it and acknowledge that it fully sets forth my agreement with the Office of the United States Attorney for the Western District of Pennsylvania. I affirm that there have been no additional promises or representations made to me by any agents or officials of the United States in connection with this matter.

/s/ Billy Joe Reynolds
BILLY JOE REYNOLDS

8/18/08
Date

Witnessed by:

/s/ J.J. Finkelstein
JAY J. FINKELSTEIN, ESQUIRE
Counsel for Billy Joe Reynolds

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

UNITED STATES
OF AMERICA

vs. Criminal Action No. 07-412

BILLY JOE REYNOLDS,

Defendant

PROCEEDINGS

Transcript of SENTENCING commencing on Tuesday, November 18th, 2008, United States District Court, Pittsburgh, Pennsylvania, before Honorable DONETTA AMBROSE, U.S. District Judge.

APPEARANCES:

For the Government: UNITED STATES
ATTORNEY'S OFFICE
BY: CRAIG HALLER, ESQ.

For the Defendant: FEDERAL PUBLIC
DEFENDER'S OFFICE
BY: JAY FINKELSTEIN, ESQ.

Reported by:
Patricia Sherman
Official Court Reporter
Room 5380 USPO & Courthouse
Pittsburgh, Pennsylvania 15219
(412) 281-6855

Proceedings recorded by mechanical stenography. Transcript produced by computer-aided transcription.

* * *

[10] doesn't get around the ex post facto problem, Your Honor. If you apply the guidelines that are applicable today, and once again, I think 2A3.5 was not in existence and there would be a serious ex post facto problem.

THE COURT: Well, so, do you want to address Mr. Haller's argument at all that, post-Booker, ex post facto it just isn't an issue because of the advisory nature of the sentencing guidelines.

MR. FINKELSTEIN: Well, they are advisory and that's why I'm urging the Court to equally consider the Chapter 7 violation, Your Honor.

THE COURT: All right. Well, I think – I think this. I think consideration of 2A3.5 does not in this instance violate the ex post facto laws. I believe that, given the advisory nature of the guidelines, it is permissible to consider this, particularly considering that I would be talking about the sentencing guidelines manual in effect at the date of sentencing which is today.

I do not find the supervised release guidelines to be analogous to this case because a new crime was committed here. I think it's a very different situation. We have a new offense. We have Mr. Reynolds coming to Pennsylvania, being aware of an obligation to register, refusing to do so, and being – and admitting

guilt, conditionally, I agree, but admitting guilt to this new offense.

[11] So, I do believe it's an appropriate factor to consider and am finding that the total offense level in this case under the advisory guidelines, and again, this is an advisory guideline range is 13, the criminal history category is three, the range is 18 to 24 months incarceration. The supervised release range is two to three years, and the fine range is 3,000 to $30,000.

Now, Mr. Finkelstein, you had also argued that you felt that the criminal history category three seriously over-represented his criminal – his actual criminal history.

MR. FINKELSTEIN: Well, what I'm pointing out to the Court is, he's a 42-year old man. He has one conviction in his entire life, nothing as a juvenile, no other convictions or arrests as an adult. I understand how it becomes a criminal history category three but for the one offense.

THE COURT: You think it overrepresents it simply because it was for one offense.

MR. FINKELSTEIN: Generally, when you see somebody in category three, they have been in trouble more than once, two or three times.

THE COURT: It depends on what kind of trouble they were in; doesn't it?

MR. FINKELSTEIN: It does. But this is a 42-year old man with no prior – I'm sorry – but for

the one offense, no other criminal history. I think the Court needs to

* * *

[16] MR. HALLER: To present the evidence, Your Honor, I call Deputy United States Marshal Bob Holtz.

*****

ROBERT HOLTZ, a witness, having been first duly sworn, testified as follows:

THE WITNESS: I do.

DIRECT EXAMINATION

BY MR. HALLER:

Q Sir, would you please state your name for the record?

A It's Robert Holtz, H-O-L-T-Z.

Q How are you employed?

A I'm employed by the United States Marshal's Service assigned to the Western District of Pennsylvania.

Q Were you the investigator of the case of the United States versus Billy Joe Reynolds?

A I was.

Q As a result of your investigation of the case, did you have an opportunity to personally interview Mr. Reynolds?

A I did.

Q When did you interview him?

A I'm going to refer to my report of the interview, okay?

Q If it would refresh your recollection.

A Yes. I interviewed Mr. Reynolds on October 18, 2007.

Q Where was the interview?

A The Washington County Jail.

[17] Q How long was your interview, approximately, of Mr. Reynolds?

A Approximately 20 minutes.

Q During your interview of Mr. Reynolds, did he appear to understand the questions you were asking him?

A He did quite clearly.

Q Was there ever a time where his questions were not responsive to the subject of your questions?

A There was not.

Q Or actually, I think his answers were not responsive to your questions. Was there ever any time like that?

A There was not.

Q Did you discuss the subject of whether he registered as a sex offender in Pennsylvania?

A I did.

Q What was his response?

A He stated that he did not register as a sex offender in Pennsylvania.

Q During that same time period, did you bring up the subject of whether he knew he should have registered in Pennsylvania?

A I did.

Q What was his statements about that subject?

A He stated that he knew he should register in Pennsylvania and he stated that he just didn't know why he did not [18] register.

Q Did he explain to you why he came to Pennsylvania?

A He did.

Q What was his explanation?

A He stated that he met his girl friend, a female by the name of Melissa Hall, approximately two and a

half years prior to coming to Pennsylvania. He came to Pennsylvania to be with her.

Q Did he mention how he met Melissa Hall?

A He did. He said he met her on a cell phone chat line.

Q What was the chat line that he said he met her on?

A It was a chat number 442-1CHAT.

Q That information about 442-1CHAT was provided by Mr. Reynolds to you?

A It was.

Q Are you aware of Melissa Hall's age?

A At the time of his arrest, she was 20 years old.

Q His statement to you that he met her approximately two and a half years before that time?

A Yes.

Q Did you receive information from parole officials in Missouri after you began investigating this case?

A I did.

Q Do you have Exhibit No. 1 in front of you?

A I do.

[19] Q Is Exhibit No. 1 one of the documents you received in Missouri?

A It is.

Q What is Exhibit No. 1?

A It's a probable cause affidavit for arrest.

MR. HALLER: Your Honor, the United States moves for the admission of Exhibit No. 1.

MR. FINKELSTEIN: Same objection, Sheppard objection to this document.

THE COURT: Objection is overruled.

BY MR. HALLER:

Q Are Exhibits 2 and 3 in front of you, Deputy Holt?

A They are.

Q What are Exhibits 2 and 3?

A Exhibit 2 is a Missouri offender registration notification as well as No. 3 is the continuation of that form.

Q And were those documents received by you from Missouri parole officials?

A They were.

MR. HALLER: United States moves for the admission of Exhibits 2 and 3.

MR. FINKELSTEIN: I have no objection to those, Your Honor.

THE COURT: Okay. Admitted.

[20] BY MR. HALLER:

Q Finally, Deputy Holtz, do you have Exhibits 4 and 5 in front of you?

A I do.

Q What are Exhibit 4 and 5?

A They are letters written by Billy Joe Reynolds.

Q Are they signed Billy Joe Reynolds at the bottom?

A They are.

Q Where did you receive those letters from?

A Missouri state parole office sent these to me.

MR. HALLER: Okay. Your Honor, United States moves for the admission of Exhibits 4 and 5.

MR. FINKELSTEIN: No objection.

THE COURT: Admitted.

MR. HALLER: No additional questions of this witness, Your Honor.

CROSS EXAMINATION

BY MR. FINKELSTEIN:

Q Mr. Holtz, can I see your report, please, or do you have a copy?

Marshal Holtz, am I correct that your report is your synopsis of what happened; is that right?

A It's a synopsis of the notes that I took from the interview.

Q Correct. I'm sorry. It's a synopsis of the notes that [21] you took from the interview but it's not a handwritten statement by Mr. Reynolds; am I right?

A You're right.

Q You have no idea whether or not Mr. Reynolds is able to read or write; am I correct?

A When I issued his Miranda warnings to him, I verbally gave them to him. After I gave them to him, I gave him a copy of my form for the Miranda warnings and asked him to read those. At that point, after he read those, I said to him, do you understand your Miranda warnings? He said, yes, I do. Then he signed that.

Q But you have no idea whether or not he truly understood those; am I right?

A He told me he did understand them.

Q I understand he told you that.

A So, from my dealings with him, I believed he understood those, yes.

Q You have no understanding of whether or not he can read or write; am I correct?

A I don't.

Q You have no idea what his IQ is?

A I don't.

Q And for the record, Melissa Hall is an adult; am I right?

A She was.

MR. FINKELSTEIN: Thank you, Your Honor. No further

* * *

[23] because he has committed a serious crime in the past, he served a substantial sentence for that crime. While on parole, he left the State of Missouri, he came to Pennsylvania, he did not register here. Those are also reasons why I do not believe that the criminal three history category overrepresents his actual criminal history.

So, all right. Now, we can continue. Mr. Finkelstein, I think it's in your court.

MR. FINKELSTEIN: Well, I would just note my objection to the Court's rulings. We're left now with the 3553(a) factors.

THE COURT: Yes.

MR. FINKELSTEIN: Which I have also briefed for the Court. I apologize, Your Honor.

THE COURT: I understand.

MR. FINKELSTEIN: I'm quickly losing my voice.

Attached to my memorandum was a report from Dr. Bernstein. He did an IQ test and found 73 which is really borderline intellectual functioning or to put it another way mildly retarded. He's illiterate.

You also have a letter from Deputy Warden Emerick and I'll quote him, Mr. Reynolds' behavior has been indicative of a model inmate. His supervisory report that Mr. Reynolds has proven himself in the position of trust. No disciplinary actions.

[24] You have a letter from Roger Alderman, his brother, who has told the Court that the family will welcome him back, support him, and find him employment.

Once again, this is a brand new law. I would ask you to look at a number of other factors. The instant offense, failure to report, is not violent. He has one prior conviction. Once again, I was somewhat surprised that this was a – this is first of many cases of cases of first impression. I think a lot of people aren't aware of that.

He was working at the time of his arrest, and I would submit, Your Honor, that any further jail time

would be simply punitive. He's been in custody since October 16, 2007.

THE COURT: Most of that has been on the parole violation.

MR. FINKELSTEIN: Well, he came back into federal custody on January 16, 2008.

THE COURT: So, he's been serving a federal sentence since January 16, 2008?

MR. FINKELSTEIN: Yes, Your Honor.

THE COURT: Okay.

MR. FINKELSTEIN: So, I would ask for a sentence of time served, and clearly, I think that would be sufficient but not greater than necessary to meet the goals of sentencing for an offense, arguably, the Court of Appeals may overturn anyway.

* * *

[31] And one of them is to reflect the seriousness of the offense and what your offense here is failing to register as a sex offender.

Mr. Haller has indicated that it's important that these laws be obeyed by individuals such as you who have been convicted of sex crimes because the public needs to know and the public needs to be protected. I do find this to be a serious offense because those are important goals that the Assistant United States Attorney has mentioned.

One of the other things that I have to consider today is a sentence that promotes respect for the law. Now, I am not sure why you didn't register when you came. Sounds like you're not sure as well. I'm not sure the circumstances under which you left Missouri. You knew you were on parole, that's for sure. So, I am assuming that because you had a parole violation in Missouri, it was because you left the jurisdiction without permission from the Missouri parole board that was governing your supervision.

It is difficult for me to understand what kind of respect you have for the law. I understand there are limitations, that you have some difficulty, perhaps, reading and writing, but I do believe that based on what I heard from you, and what I have read in the presentence report, and what I have heard from the marshal, that you understood that, at least, that there was a law and that you had to comply with it

* * *

UNITED STATES DISTRICT COURT

Western District of Pennsylvania

UNITED STATES OF AMERICA

V.

BILLY JOE REYNOLDS

JUDGMENT IN A CRIMINAL CASE

(Filed Nov. 24, 2008)

Case Number: 07-00412-001

Jay Finkelstein
Defendant's Attorney

THE DEFENDANT:

x pleaded guilty to count(s) 1(one) of the Indictment.

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty. _____

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 2250(a)	Failure to Register as a Sex Offender	10/16/07	1

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

_____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

X It is Ordered that the defendant shall pay to the United States a special assessment of $100 which shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of material change in defendant's economic circumstances.

09071-068
Defendant's USM No.

November 18, 2008
Date of Imposition of Judgment

/s/ Donetta W. Ambrose
Signature of Judicial Officer

Donetta W. Ambrose,
Chief United States District Judge
Name and Title of Judicial Officer

11/24/08
Date

IMPRISONMENT

x The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 18 months.

x The court makes the following recommendations to the Bureau of Prisons:

Incarceration as close to ST. Francis, Arkansas as possible.

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows: _____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY
UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

While on supervised release, the defendant shall not commit another Federal, state or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by the court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of the supervised release. The defendant shall comply with the following additional conditions:

x The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

X The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

X The defendant shall cooperate in the collection of DNA as directed by the probation officer.

x The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is directed by the probation officer.

☐ The defendant shall participate in an approved program for domestic violence.

x Additional conditions (See below)

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

Additional Conditions:

SEE ATTACHED

ADDITIONAL CONDITIONS

The defendant shall not legally possess a controlled substance.

The defendant shall not possess a firearm, ammunition, destructive device, or other dangerous weapon.

The defendant shall participate in a mental health treatment program and/or sex offender treatment program as approved and directed by the probation officer. The defendant shall abide by all program rules, requirements, and conditions of the sex offender treatment program, including submission to polygraph testing to determine if he is in compliance with the conditions of release.

In accordance with 18 U.S.C. §§ 3563(a)(8) and 3583(d) and 42 U.S.C. § 16901, the defendant shall report the address where he will reside and any subsequent change of address to the probation officer responsible for the defendant's supervision, and further, the defendant shall register as a convicted sex offender in any state where he resides, is employed, carries on a vocation, or is a student.

The defendant shall submit his person, property, house, residence, vehicle, papers, effects, computers, and other electronic communication or data storage devices or media, to search at any time with or without

a warrant by any law enforcement or probation officer, based upon reasonable suspicion of unlawful conduct or a violation of a condition of release/ supervision. Failure to submit to a search may be grounds for revocation. The defendant shall inform any other residents that the premises may be subject to a search, pursuant to this condition.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) the defendant shall not commit another Federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history of characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-4747

UNITED STATES OF AMERICA

v.

BILLY JOE REYNOLDS,
Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
District Court No. 2-07-cr-00412-001
District Judge: The Honorable Donetta W. Ambrose

Argued October 27, 2009

Before: SMITH, FISHER, and STAPLETON,
Circuit Judges

(Filed: May 14, 2010)

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Candace Cain (argued)
Jay J. Finkelstein
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Counsel for Appellant

OPINION

SMITH, *Circuit Judge.*

Billy Joe Reynolds pleaded guilty to one count of knowingly failing to register and update a registration, in violation of the Sex Offender Registration and Notification Act ("SORNA"), 18 U.S.C. § 2250. In this appeal, he challenges the constitutionality of SORNA and the legality of the Attorney General's Interim Rule implementing that law. *See* 72 Fed. Reg. 8894 (Feb. 28, 2007) (codified at 28 C.F.R. § 72.1-72.3). He also argues that his guilty plea should be invalidated because he is "actually innocent" of violating SORNA's registration requirements. We reject each of his arguments and will affirm the judgment of conviction.

First, Reynolds argues that SORNA's registration requirements exceed congressional power under the Commerce Clause. He also contends that punishing him for failing to comply with those requirements violates the Ex Post Facto Clause and offends due process. These claims are foreclosed by our decision in

United States v. Shenandoah, 595 F.3d 151 (3d Cir. 2010).

Second, Reynolds argues that SORNA's registration regime violates the Tenth Amendment. We decline to reach this argument because Reynolds lacks standing to raise it. *Id.* at 161-62.

Third, Reynolds asserts that the Interim Rule is invalid because it violates the Non-Delegation Doctrine. He also notes that the Interim Rule was made effective immediately and promulgated without a 30-day notice and comment period, and maintains that such enactment was not justified under the "good cause" exceptions of 5 U.S.C. § 553(b)(3)(B) and (d)(3). We decline to reach these arguments as well. In *Shenandoah*, we held that the Interim Rule affected only those sex offenders who "did not have a registration requirement prior to the passage of SORNA but nonetheless were subject to sex offender registration requirements after SORNA became law[.]" 595 F.3d at 163. We further held that the defendant, who was required to register as a sex offender under state law before SORNA was enacted – and was in fact so registered – lacked standing to challenge the Interim Rule. *Id.* at 163-64. Reynolds was likewise registered under state law before Congress passed SORNA. Therefore, the Interim Rule did not apply to him, and he lacks standing to challenge it. *Id.* at 163-64.

Finally, Reynolds argues that he was actually innocent of violating SORNA's registration requirement, because SORNA required him to register only

after he habitually resided in Pennsylvania for at least 30 days, and he was present in the Commonwealth for only 29 days before his arrest. Reynolds waived the right to advance that argument in his plea agreement, however, and we conclude that enforcement of that waiver would not constitute a miscarriage of justice. *United States v. Gordon*, 544 F.3d 529, 533 (3d Cir. 2008).

The judgment of conviction will be affirmed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-4747

UNITED STATES OF AMERICA

v.

BILLY JOE REYNOLDS,
Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
District Court No. 2-07-cr-00412-001
District Judge: The Honorable Donetta W. Ambrose

Argued October 27, 2009

Before: SMITH, FISHER, and STAPLETON,
Circuit Judges

JUDGMENT

(Filed May 14, 2010)

This cause came on to be considered on the record from the United States District Court for the Western District of Pennsylvania and was argued on October 27, 2009.

On consideration whereof, it is now hereby AD-JUDGED and ORDERED that the judgment of the

District Court entered November 24, 2008, be and the same is hereby AFFIRMED. All of the above in accordance with the opinion of this Court.

Attest:

/s/ Marcia M. Waldron
Clerk

DATED: May 14, 2010

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-4747

UNITED STATES OF AMERICA
v.
BILLY JOE REYNOLDS,
Appellant

SUR PETITION FOR REHEARING

(Filed: Jun. 16, 2010)

Present: MCKEE, Chief Judge, SLOVITER, SCIRICA, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, VANASKIE, and STAPLETON*, Circuit Judges,

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in

---

* The vote of the Honorable Walter K. Stapleton, Senior Judge for the Third Circuit Court of Appeals, is limited to panel rehearing.

regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/ D. Brooks Smith
Circuit Judge

Dated: June 16, 2010

DWB/cc/

Donovan J. Cocas, Esq.
Robert L. Eberhardt, Esq.
Candace Cain, Esq.
Laura Irwin, Esq.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

January 24, 2011

Ms. Candace Cain
1500 Liberty Center
1001 Liberty Avenue
Pittsburgh, PA 15222

Re: Billy Joe Reynolds
v. United States
No. 10-6549

Dear Ms. Cain:

The Court today entered the following order in the above-entitled case:

The motion of petitioner for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted limited to Question I presented by the petition.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

PETITIONER'S BRIEF

RECORD AND BRIEFS

No. 10-6549

In The Supreme Court of the United States

BILLY JOE REYNOLDS

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR THE PETITIONER

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COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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QUESTION PRESENTED

Does a sex offender convicted before enactment of the Sex Offender Registration and Notification Act ("SORNA") have standing to contest the validity of the Interim Rule, issued by the Attorney General pursuant to the authority granted in 42 U.S.C. § 16913(d) of the Act, specifying SORNA's applicability to such offenders?

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Appendix B – Sex Offender Registration and Notification (Interim Rule and Final Rule) 28 C.F.R. §§ 72.1-72.3 ..... App. 26

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OPINIONS BELOW

The non-precedential, unpublished opinion of the United States Court of Appeals for the Third Circuit was filed on May 14, 2010 at Appeal No. 08-4747 and appears at pages 62 to 65 of the Joint Appendix (hereinafter "J.A."). The opinion can be found at 380 F. App'x 125, 2010 WL 1936261 (3d Cir. 2010).

The Third Circuit filed an order denying Mr. Reynolds' petition for rehearing en banc on June 16, 2010 at Appeal No. 08-4747. (J.A. 66-67.)

The district court's unpublished memorandum order denying petitioner's motion to dismiss was filed on June 27, 2008. (J.A. 20-23.) The judgment of sentence was entered at Criminal No. 07-412 in the Western District of Pennsylvania on November 24, 2008. (J.A. 20-23.)

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Third Circuit entered judgment on May 14, 2010 affirming the District Court in an unpublished panel opinion. (J.A. 62-65.) The request for rehearing was denied on June 16, 2010. (J.A. 66-67.)

The Petition for Writ of Certiorari was filed on September 14, 2010 and was granted, limited to Question 1 presented by the petition, on January 24, 2010. (J.A. 70.) This Court has jurisdiction to review

the judgment of the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTORY PROVISIONS AND RULES INVOLVED[1]

Constitutional Provisions Involved:

Art. III, § 2, cl. 1

> "Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

[1] The relevant provisions of the Sex Offender Registration and Notification Act (SORNA), codified at 42 U.S.C. §§ 16901-16962, and the Interim and Final Rules, codified at 28 C.F.R. § 72.1 through 72.3; 72 Fed. Reg. 8894, 8897 and 75 Fed. Reg. 81,849, 81,853 are reproduced in the appendices A and B to this brief.

Art. I, § 9, cl. 3

"No Bill of Attainder or ex post facto Law shall be passed."

Statutory Provisions Involved:

42 U.S.C. § 16913(d)

"Initial registration of sex offenders unable to comply with subsection (b)

The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b)."

18 U.S.C. § 2250

"Failure to Register

(a) In general. Whoever

(1) is required to register under the Sex Offender Registration and Notification Act;

(2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or

(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;

shall be fined under this title or imprisoned not more than 10 years, or both."

* * *

STATEMENT OF THE CASE

1. On July 27, 2006, Congress enacted the Adam Walsh Child Protection and Safety Act of 2006 ("Adam Walsh Act"). Title I of the Adam Walsh Act codified the Sex Offender Registration and Notification Act ("SORNA"), 42 U.S.C. § 16901 *et seq.* SORNA requires individuals convicted of "sex offenses" to register and keep the registration current, in each jurisdiction where they live, work or attend school. 42 U.S.C. §§ 16911(5)(A), 16913(a) & (c).

In one of SORNA's many provisions, Congress provided that "[t]he Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction."[2] 42 U.S.C.

[2] There is a discrepancy between the language of the provisions in the United States Code Annotated and the United

(Continued on following page)

§ 16913(d). Billy Joe Reynolds is such an offender, because his October 10, 2001, Missouri sex offense conviction pre-dated SORNA's enactment by almost five years.[3]

2. At the heart of this case is whether SORNA's registration requirements were applicable to individuals with pre-SORNA sex offense convictions before the Attorney General acted upon the authority granted in § 16913(d) and provided for their inclusion by issuing a valid regulation. If, as Mr. Reynolds maintains, SORNA's application to him required action by the Attorney General under § 16913(d), he has an interest sufficient to establish constitutional standing to challenge the validity of the Attorney General's rule-making process, and his conviction under SORNA's enforcement provision, 18 U.S.C. § 2250.

States Code. The United States Code Annotated added the words "of this section" to the body of § 16913(c) and to the title and the body of § 16913(d). *See United States v. DiTomasso*, 621 F.3d 17, 20 n.2 (1st Cir. 2010). In addition, the body of subsection (d) in the United States Code Annotated version uses the phrase "before July 27, 2006" whereas the United States Code states "before the enactment of this chapter." 42 U.S.C. § 16913(d). The official United States Code version of SORNA is used throughout this brief. *Id.*

[3] Mr. Reynolds pleaded guilty in Missouri state court to statutory sodomy in the second degree and was sentenced to seven years' imprisonment. (J.A. 13, 15; Presentence Investigation Report ("PSR") ¶ 24.) He was released from custody to parole on July 21, 2005, with parole to expire on July 19, 2008. (J.A. 15.)

Statutory and Regulatory History

3. SORNA represents the most recent congressional effort to "set national standards for state sex-offender registration programs[.]" *See Carr v. United States*, 130 S. Ct. 2229, 2238 (2010). The initial effort came in 1994, when Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act ("Wetterling Act"), which established guidelines for states to use in tracking sex offenders. The guidelines also provided a period of three years for states to implement necessary systems or risk losing federal funding for crime control. Pub. L. No. 103-322, § 170101, 108 Stat. 1796, 2038 (1994). The Wetterling Act required persons convicted of sexually violent offenses or certain criminal offenses against minors to register a current address with a designated state law-enforcement agency after release from prison. Wetterling Act, § 170101, 108 Stat. at 2038-2041. Offenders who moved between states were given ten days to register in the new state. *Id.* at 2041. Significantly, the Wetterling Act did not initially include a federal criminal penalty for failing to register or for failing to keep registration current. *See id.* at 2041 (requiring individual States to criminalize failure to register).

By 1996, every State and the District of Columbia had enacted sex offender registration laws. *Smith v. Doe*, 538 U.S. 84, 90 (2003). That year, Congress amended the Wetterling Act and directed the Attorney General to establish a national registry of sex offenders at the FBI. Pam Lyncher Sexual Offender

Tracking and Identification Act of 1996 ("Lyncher Act"), Pub. L. No. 104-236, 110 Stat. 3093 (codified as amended at 42 U.S.C. § 14072). It also delegated to the Attorney General the duty to "promulgate[ ]" guidelines directing the FBI to ensure the verification of the registrants' addresses and to develop guidelines for the use of registrants' fingerprints in the FBI's registry. *Id.* at 3094, 3096.

The following year, Congress again amended the Wetterling Act, requiring all states to participate in the national registry. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, § 115, 111 Stat. 2440, 2461-2467 (1997) (codified at 42 U.S.C. §§ 14071-14072). Under the 1997 amendment, states were required to provide the FBI with information on all sex offenders deemed to be included in the national registry. *Id.* at 2462-2463.

Nine years later, Congress again revisited sex offender registration. Having decided that "the patchwork of standards that had resulted from piecemeal amendments [to the Wetterling Act] should be replaced with a comprehensive new set of standards," Congress passed SORNA, Pub. L. No. 109-248, tit. I, 120 Stat. 587-601 (2006) (codified at 18 U.S.C. § 2250 and 42 U.S.C. § 16901 *et seq.*). National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,045 (July 2, 2008) ("SMART Guidelines").

4. SORNA created a new, national sex offender registry, expanded the Wetterling Act's definition of "sex offense," 42 U.S.C. § 16911(5), and added to the information states must collect about offenders, 42 U.S.C. § 16914(a). In addition to an offender's current address, photograph, and fingerprints, which were sufficient to satisfy the requirements of the Wetterling Act, *see id.* § 14072(c), SORNA requires sex offenders to provide Social Security numbers, employer and school information, as well as license plate numbers and other vehicle information. *Id.* § 16914(a). SORNA also requires a jurisdiction to collect and record a sex offender's physical description, sexual offense, criminal history, full palm print, DNA sample, and a photocopy of the offender's driver's license. *Id.* § 16914(b).

Under SORNA, a sex offender must register "before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement" or "not later than three business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment." *Id.* § 16913(b)(1)-(2). When an offender changes his or her name, residence, employer, or student status, he or she must appear in person to update the registration within three days of the change. *Id.* § 16913(c).

5. The new federal felony defined in 18 U.S.C. § 2250 applies to any person who (1) "is required to register under [SORNA]," (2) "travels in interstate or foreign commerce," and (3) "knowingly fails to register or update a registration." 18 U.S.C. § 2250(a).

Whereas the Wetterling Act punished the failure to register with a maximum term of one year imprisonment, a violation of SORNA is punishable by up to ten years' imprisonment. *Id.* § 2250(a). Mr. Reynolds was indicted for violating this statute. (J.A. 13-14.)

6. As noted, SORNA expressly grants the Attorney General "the authority to specify the applicability of the requirements of this subchapter [*i.e.*, the registration requirement] to sex offenders convicted before enactment of this chapter or its implementation in a particular jurisdiction." 42 U.S.C. § 16913(d). In the same subsection, SORNA authorizes the Attorney General "to prescribe rules for the registration of any such offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section."[4] *Id.*

7. On February 28, 2007, approximately seven months after the enactment of SORNA, the Attorney General exercised his authority under the first clause of § 16913(d) and promulgated an interim regulation, specifying that the requirements of SORNA applied to pre-enactment sex offenders. 72 Fed. Reg. 8894, 8897 (Feb. 28, 2007) (codified at 28 C.F.R. pt. 72) ("Interim Rule"). The summary introduction to the Interim Rule announced that "[t]he Department of Justice is publishing this interim rule to specify that the requirements of [SORNA] apply to sex offenders convicted

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[4] Subsection (b) of § 16913, as noted above, sets forth the requirements for initial registration under SORNA.

. . . prior to the enactment of that Act." *Id.* at 8894. It also explained that "[t]he Attorney General has the authority to make this specification pursuant to sections 112(b) and 113(d) of" SORNA.[5] *Id.* at 8896.

The Interim Rule itself states, in its entirety, that "[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." *Id.* at 8897. The Attorney General provided two illustrative examples along with the Interim Rule – one of which describes an offender who is similarly situated to Mr. Reynolds:

> Example 2. A sex offender is convicted by a state jurisdiction in 1997 for molesting a child and is released following imprisonment in 2000. The sex offender initially registers as required, but disappears after a couple of years and does not register in any other jurisdiction. Following the enactment of the Sex Offender Registration and Notification Act, the sex offender is found to be living in another state and is arrested there. The sex offender has violated the requirement under the Sex Offender Registration and Notification Act to register in each state in which he resides, and could be held criminally liable

[5] Sections 112(b) and 113(d) of SORNA are codified at 42 U.S.C. §§ 16912(b) and 16913(d), respectively.

> under 18 U.S.C. 2250 for the violation because he traveled in interstate commerce.

Id.

8. The Attorney General promulgated the Interim Rule outside of the notice and comment procedure generally required under the Administrative Procedure Act, 5 U.S.C. § 553(b)(3)(B). *Id.* at 8896. The Attorney General took the position that the registration requirement applied to pre-SORNA sex offenders from the date of enactment, but nevertheless "exercise[d] his authority under section [16913(d)] of SORNA to specify [the] scope of application of SORNA, regardless of whether SORNA would apply with such scope absent [the] rule." *Id.* at 8896. He also maintained that, due to the immediate need for the Interim Rule, there was "good cause" to forego the notice and public procedure normally required under § 553(b). *Id.* at 8896-8897. Although the Attorney General invited "post-promulgation public comments," to be submitted by April 30, 2007, *id.* at 8895, 8896, he also asserted that it would "be contrary to the public interest to adopt [the] rule with the prior notice and comment period normally required under 5 U.S.C. § 553(b) or with the delayed effective date normally required under 5 U.S.C. § 553(d)," *id.* at 8897.

9. On May 30, 2007, the Attorney General proposed guidelines for the application and execution of SORNA, thereby exercising the authority granted in the second clause of § 16913(d), "to prescribe

rules," and acting on the directive in § 16912(b), to "issue guidelines and regulations," by issuing proposed National Guidelines. 72 Fed. Reg. 30,210 (May 30, 2007); *see also* 42 U.S.C. §§ 16912(b) & 16913(d). The National Guidelines are commonly referred to as the "SMART Guidelines," named after the Office of Sex Offender Sentencing, Monitoring, Apprehending and Registering and Tracking, that was created by Congress to administer SORNA and, under the general authority of the Attorney General, was tasked with developing the proposed guidelines into final administrative rules through the public notice and comment process. 72 Fed. Reg. at 30,210; *see also* 42 U.S.C. § 16945(a).

10. The proposed SMART Guidelines again affirmed the Attorney General's statutory authority to specify the applicability of SORNA's registration requirements to pre-enactment sex offenders. *Id.* at 30,212. The guidelines specifically reference 28 C.F.R. part 72, as the provision that makes SORNA applicable to sex offenders with pre-SORNA convictions. *Id.* The final SMART Guidelines were revised in response to public comments, and did not issue until July 2, 2008 ("Final Guidelines"). 73 Fed. Reg. 38,030 (July 2, 2008). The Final Guidelines stated that "SORNA applies to all sex offenders, including those convicted of their registration offenses prior to the enactment of SORNA or prior to particular jurisdictions' incorporations of the SORNA requirements into their programs." 73 Fed. Reg. 38,063.

After publication of the Final Guidelines, the Attorney General issued proposed supplemental guidelines on May 14, 2010. These supplemental guidelines address SORNA's implementation, as well as new legislation related to SORNA – Keeping the Internet Devoid of Sexual Predators Act of 2008 (KIDS Act of 2008), Pub. L. No. 110-400, 122 Stat. 4224. *See* 75 Fed. Reg. 27,362 (May 14, 2010).

On December 29, 2010, again acting pursuant to the authority granted in 42 U.S.C. § 16913(d), the Attorney General issued a Final Rule, specifying SORNA's applicability to those with pre-SORNA convictions. 75 Fed. Reg. 81,849, 81,850 (codified at 28 C.F.R. § 72.3). The Interim Rule was adopted as the Final Rule. *Id.*

The final Supplemental SMART Guidelines were thereafter issued on January 10, 2011. Supplemental Guidelines for Sex Offender Registration and Notification, 76 Fed. Reg. 1630 (Jan. 11, 2011).

Factual and Procedural History

11. During the period between the issuance of the proposed SMART Guidelines in May of 2007 and the Final Guidelines in July of 2008, a grand jury in the Western District of Pennsylvania returned a single-count indictment against Mr. Reynolds, alleging a failure to register, or update his registration, as a sex offender. (J.A. 13.) The indictment alleged that,

> Between on or about September 16, 2007, and on or about October 16, 2007, in the Western District of Pennsylvania, the defendant, BILLY JOE REYNOLDS, who was required to register under the Sex Offender Registration and Notification Act after having been convicted in 2001 in . . . [Missouri] . . . of the felony sex offense of Statutory Sodomy in the 2nd Degree, traveled in interstate commerce and knowingly failed to register and update a registration as required by the Sex Offender Registration and Notification Act.

(Id.)

12. Mr. Reynolds moved to dismiss the indictment on constitutional and other grounds. (Id. 1.) In the motion, Mr. Reynolds argued that the Attorney General's Interim Rule was issued in violation of the Administrative Procedure's Act, 5 U.S.C. § 553. (Id. 22.) The district court denied the motion to dismiss, and Mr. Reynolds thereafter pleaded guilty to the charge in the indictment under a conditional plea agreement in which he preserved the right to appeal his conviction on the grounds asserted in the motion to dismiss. (Id. 20-23.)

According to the government's recitation of facts during Mr. Reynolds' guilty plea colloquy, he violated SORNA because he did not "comply with Missouri sex offender registration requirements when he left Missouri for Pennsylvania," and did not register in

Pennsylvania after arriving. (Id. 30-31.) The government also maintained that Mr. Reynolds admitted "he did not register as a sex offender in Pennsylvania," and that he knew he should have. (Id.) When asked whether he agreed with the government's proffer, Mr. Reynolds, through counsel, agreed only that he did not register in Pennsylvania.[6] (Id. 31-32.)

The district court sentenced Mr. Reynolds to 18 months' imprisonment and three years' supervised release. (Id. 4-8.) The judgment was entered November 24, 2008, and a timely notice of appeal was filed on December 8, 2008. (Id. 53-61.)

13. On appeal, Mr. Reynolds again challenged the application of SORNA to him. (Id. 63.) On May 14, 2010, the Court of Appeals for the Third Circuit affirmed the judgment of the district court, finding that Mr. Reynolds' challenges under the Commerce, *Ex Post Facto* and Due Process Clauses were foreclosed by its decision in *United States v. Shenandoah*, 595 F.3d 151 (3d Cir. 2010). The Court also held that, under *Shenandoah*, Mr. Reynolds lacked standing to challenge his conviction under the Tenth Amendment

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[6] In September 2007, Mr. Reynolds travelled from Missouri to Pennsylvania. (J.A. 31.) He did not register in Pennsylvania, and on October 16, 2007, 29 days after his arrival in Pennsylvania, he was arrested for violating his Missouri parole by leaving the state without permission. (Id.) He was thereafter federally indicted on November 27, 2007. (Id. 13.)

or to assert a claim of error based on the validity of the Interim Rule.[7] (Id. 62-65.)

With respect to the issue upon which *certiorari* was granted here – whether Mr. Reynolds has standing under the plain reading of SORNA to raise a claim concerning the validity of the Attorney General's Interim Rule – the Court found that "the Interim Rule affected only those sex offenders who 'did not have a registration requirement prior to the passage of SORNA but nonetheless were subject to sex offender registration requirements after SORNA became the law.'" (J.A. 64.); *United States v. Reynolds*, 380 F. App'x 125, 126 (3d Cir. 2010) (quoting *Shenandoah*, 595 F.3d at 163). Also relying on *Shenandoah*, the Court found that a person "who was required to register as a sex offender under state law before SORNA was enacted – and was in fact so registered – lacked standing to challenge the Interim Rule." (J.A. 64.); *Reynolds*, 380 F. App'x at 126. Apparently equating Mr. Reynolds' pre-SORNA Missouri Registration and an "initial registration" that "compl[ies] with subsection (b) [of § 16913,]" 42 U.S.C. §§ 16913(b), (d), the Court found that the Interim Rule did not apply to him and that he therefore lacked standing to challenge its validity (J.A. 64.); *Reynolds*, 380

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[7] The Court also determined that Mr. Reynolds' argument that he was actually innocent of violating SORNA was foreclosed by the appellate waiver in his plea agreement, which limited his right to appeal to only those issues raised in the motion to dismiss. (J.A. 64-65.)

F. App'x at 126 (quoting *Shenandoah*, 595 F.3d at 163).

Mr. Reynolds filed a Petition for Panel Rehearing and for Rehearing *En Banc*, which the Court denied on June 16, 2010. (J.A. 68-69.) In his Petition for Writ of *Certiorari*, Mr. Reynolds sought review of his challenges under the Commerce, *Ex Post Facto*, and Due Process clauses, as well as of the standing issue upon which the Court ultimately granted *certiorari*. (Id. 70.)

SUMMARY OF ARGUMENT

Billy Joe Reynolds has standing to challenge his conviction under the Sex Offender Registration and Notification Act ("SORNA"). Under SORNA, sex offenders are required to register, and keep the registration current, in each jurisdiction where they live, work or attend school, or face new, substantial federal penalties. The registration requirements are outlined in 42 U.S.C. § 16913. Subsection (d) of § 16913 explicitly grants authority to the Attorney General "to specify the applicability of the requirements of this subchapter [SORNA] to sex offenders convicted before the enactment of this chapter [the Adam Walsh Act]," *i.e.*, after July 27, 2006. This provision delegates to the Attorney General the authority to determine whether the requirements apply to sex offenders with pre-SORNA convictions.

Billy Joe Reynolds is such an offender. He was convicted in Missouri in 2001 before SORNA was enacted. Therefore, under the plain language of § 16913(d), Mr. Reynolds was not subject to SORNA's requirements unless and until the Attorney General acted on the authority delegated to him and issued a valid rule specifying that SORNA applied to offenders like him. Because SORNA was not applicable to Mr. Reynolds until the Attorney General acted, the Interim Rule affected him, and he therefore has constitutional standing to challenge the rule's applicability.

The text and grammatical structure of § 16913(d) unambiguously delegates to the Attorney General the applicability of SORNA's registration requirements to pre-enactment sex offenders like Mr. Reynolds. Settled principles of statutory construction, including SORNA's statutory context and SORNA's purpose confirm SORNA's plain meaning and Mr. Reynolds' standing. Although resort to SORNA's legislative history is neither required nor appropriate when the language of a statute is plain, that history also supports the conclusion that SORNA became applicable to Reynolds when the Attorney General issued a valid regulation.

Finally, to the extent there is any ambiguity in the statutory language, SORNA, like all penal statutes, must be interpreted in Mr. Reynolds' favor under the rule of lenity. Its application compels the interpretation urged here – that SORNA did not apply to Mr. Reynolds upon enactment and only

became applicable to him when the Attorney General issued a valid regulation. Therefore, remand is required.

ARGUMENT

A. BILLY JOE REYNOLDS HAS STANDING TO CONTEST THE VALIDITY OF THE INTERIM RULE ISSUED BY THE ATTORNEY GENERAL PURSUANT TO THE SEX OFFENDER NOTIFICATION AND REGISTRATION ACT.

SORNA imposed a new, comprehensive national registration system for persons convicted of sex offenses. It also created a new federal criminal offense for those who failed to comply with the new registration requirements. The question in this case is whether the registration requirements of SORNA applied to those convicted of sex offenses before its enactment. They did not. The plain language of 42 U.S.C. § 16913(d) demonstrates that Congress left it to the Attorney General to decide whether SORNA's registration requirements should apply to previously convicted persons. That reading of 16913(d) is supported by the context of the statute, the statutory structure, and the legislative history.

The Attorney General eventually decided that SORNA's registration requirements should apply to pre-enactment offenders. He promulgated an interim rule giving effect to that decision on February 28,

2007. That rule, if valid, subjected Mr. Reynolds, who had been convicted of a sex offense in 2001, to SORNA's registration requirements and criminal penalties. Because SORNA's registration requirements did not apply to Mr. Reynolds until the Attorney General issued his Interim Rule, he was in fact injured by the rule and he has standing to challenge its validity.[5]

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[5] Noting a conflict among the Courts of Appeals as to when SORNA's registration requirements became applicable to persons convicted of sex offenses prior to the statute's enactment, this Court reserved the issue in *Carr v. United States*, 130 S. Ct. 2229, 2234 n.2 (2010). The answer to the question left open in *Carr* resolves the standing issue presented in this appeal, because a determination that SORNA did not apply to pre-SORNA offenders until the Attorney General provided for their inclusion by issuing an Interim Rule would establish Mr. Reynolds' interest in the validity of the rule-making process and provide standing for his challenge to his conviction.

Courts on both sides of the conflict agree that anyone subject to criminal liability as a result of the Interim Rule has standing to challenge the rule's validity. *See United States v. Johnson*, 632 F.3d 912, 922 (5th Cir. 2011) (finding standing because § 16913(d) delegated power to criminalize failure to register for pre-enactment offenders); *United States v. Valverde*, 628 F.3d 1159, 1161 (9th Cir. 2010) (same); *United States v. Hinckley*, 550 F.3d 926, 929-935 (10th Cir. 2008) (finding no standing because defendant was not covered under § 16913(d)); *United States v. May*, 535 F.3d 912, 916-919 (8th Cir. 2008) (same).

1. The Plain Language Of 42 U.S.C. § 16913(d) Delegates The Applicability Of SORNA's Registration Requirements For Sex Offenders With Pre-SORNA Convictions, Like Mr. Reynolds, To The Attorney General.

The Court's "analysis begins, as always, with the statutory text." *United States v. Gonzales*, 520 U.S. 1, 4 (1997). Where the text "is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). Here, the plain text of the federal sex offender registration statute resolves the question whether Billy Joe Reynolds has standing to contest the validity of the Attorney General's Interim Rule.

The general requirements for registration of sex offenders under SORNA are contained in one section of SORNA: 42 U.S.C. § 16913. That section contains four subsections, (a) through (d), all of which pertain to the registration of sex offenders as described below. 42 U.S.C. §§ 16913(a)-(d). Subsections (a) through (c) address how sex offenders must register, report or update their registration under SORNA. Subsection (d) addresses special subsets of sex offenders, including sex offenders like Reynolds, who were convicted prior to SORNA's enactment.

Subsection (a) sets forth the general registration rule, requiring sex offenders to register where they live, work, attend school and, for purposes of "initial

registration," in the jurisdiction where they were convicted, if different. *Id.* § 16913(a).

Subsection (b) describes how sex offenders must "initially register," depending on whether the offender received a prison sentence. *Id.* § 16913(b)(1)-(2). The first method provides that "the sex offender . . . shall initially register . . . before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement." *Id.* § 16913(b)(1). The second method provides that "the sex offender . . . shall initially register . . . not later than 3 business days after being sentenced for that offense, if the offender is not sentenced to a term of imprisonment." *Id.* § 16913(b)(1)-(2).

Subsection (c) tells the offenders identified in (a) where and when they must register or report, mandating that they "appear in person" in a jurisdiction "involved pursuant to subsection (a)" to report "all changes in the information" in the registry "not later than 3 business days after each change of name, residence, employment, or student status." *Id.* § 16913(c).

Subsection (d) states:

> (d) Initial registration of sex offenders unable to comply with subsection (b)
>
> The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction,

> and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).

42 U.S.C. § 16913(d). Because Reynolds is a "sex offender[ ] convicted before enactment of this chapter," subsection (d) plainly applies to him.

a. Subsection (d) authorizes the Attorney General to specify both *whether* and *how* SORNA applies to previously convicted sex offenders.

The plain wording and grammatical structure of subsection (d) delineates two distinct tasks for the Attorney General, set forth in two separate clauses: (1) "to specify the applicability" of SORNA's requirements to sex offenders who were convicted before it was enacted or implemented, and (2) "to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders" who are unable to comply with the initial registration requirements of subsection (b). The use of the word "and," following the lone comma in the subsection and preceding the words "to prescribe," divides subsection (d) – and the Attorney General's authority – into two distinct parts, each of which begins with separate infinitive verbs – "to specify" and "to prescribe" – which act as adjectives describing the Attorney General's "authority" set out in the subsection and which control the infinitive phrases that follow them. The direct object of "to specify" is "the applicability," and

the direct object of "to prescribe" is "rules." A direct object is a "noun or pronoun that receives the action of a transitive verb," and a transitive verb is one "that requires a direct object to complete its meaning."[9] William Strunk, Jr. & E.B. White, *The Elements of Style* 127 (2005). The use of these two infinitive phrases, separated by the word "and," confirms that subsection (d) involves two distinct grants of authority to the Attorney General.[10]

By its plain terms, the authority granted in the first clause of subsection (d) pertains only to sex offenders convicted before SORNA was enacted or implemented, and it expressly authorizes the Attorney General to specify SORNA's applicability to these offenders.[11] By choosing to follow the phrase "to specify the applicability of" with "to" a group of offenders, Congress made clear that the Attorney General was authorized to determine *whether* SORNA's registration requirements would be applied

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[9] Grammar is, of course, relevant to statutory construction and, in this case, is instructive in determining the plain meaning of § 16913(d). *United States v. Johnson*, 632 F.3d 912, 923-924 n.61 (5th Cir. 2011) (citing *Bloate v. United States*, 130 S. Ct. 1345, 1354 (2010); *Ron Pair Enters., Inc.*, 489 U.S. at 241); *see also United States v. Hatcher*, 560 F.3d 222, 227 (4th Cir. 2009).

[10] Even those circuits that have found that SORNA's registration requirements applied to pre-SORNA offenders upon enactment agree that § 16913(d) contains two separate clauses. *See United States v. Fuller*, 627 F.3d 499, 504 (2d Cir. 2010); *DiTomasso*, 623 F.3d at 21.

[11] The Interim Rule at issue here addresses only the applicability of SORNA to pre-enactment offenders.

to pre-SORNA sex offenders. In other words, when viewed in context, the phrase "to specify the applicability of" in subsection (d) is properly read to mean to determine, in the first instance, that is, *whether* SORNA would apply to offenders who could not have initially registered under SORNA before the statute was enacted.[12] *See United States v. Johnson*, 632 F.3d 912, 924 (5th Cir. 2011) (interpreting § 16913(d)); *see generally Davis v. Mich. Dep't of Treas.*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").[13]

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[12] This authority to determine *whether* SORNA applies to those with pre-SORNA convictions necessarily includes the authority to determine *when* SORNA would be applied to those persons. *See United States v. Cain*, 583 F.3d 408, 417 (6th Cir. 2010) ("Congress employed language specifying that SORNA could apply to all sex offenders, but that the Attorney General would specify when offenders with past convictions and offenders convicted before the states fully implemented SORNA would be required to register. Such a system enables the Attorney General to balance administrative constraints with the goal of complete coverage.").

[13] In *Fuller*, the court refused "to equate 'specify' with 'determine in the first instance.'" 627 F.3d at 504. In the court's view, the authority delegated in the first clause of subsection (d) simply authorized the Attorney General to explain "how" SORNA's registration requirements would be applied to pre-SORNA offenders, and not "whether" they would apply. *Id.* at 506. However, had Congress chosen to delegate to the Attorney General the authority to specify "how" SORNA would be applied to pre-SORNA offenders in the first clause of subsection (d), it would have granted the authority to specify the applicability of

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Significantly, the resulting specification, *i.e.*, the Interim Rule issued pursuant to the authority delegated in the first clause of subsection (d), confirms the plain meaning. The Interim Rule states, in its entirety, that "[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." *Id.* at 8897. The Attorney General obviously read subsection (d) as granting the authority to indicate *whether* and not *how* SORNA would be applied to pre-enactment offenders.[14]

SORNA *for* sex offenders convicted before enactment. Under such an iteration, the word "specify" might correctly be given an alternative meaning.

[14] If the phrase "to specify the applicability of the requirements of [SORNA]" in § 16913(d) "refer[red] to [the] authority to work out the complications that may arise in the application of a new federal criminal law to an already existent class of offenders, the myriad permutations of which Congress chose not to address in the Act itself, in order to ensure an efficient and 'comprehensive' national sex offender registration system," *i.e.*, *how*, *Fuller*, 627 F.3d at 506, one would have expected the Interim Rule to address such complications and permutations, but it did not.

Furthermore, as the Attorney General made clear, the purpose of the Interim Rule was "not to address the full range of matters that are within the Attorney General's authority under section 113(d), much less to carry out the direction to the Attorney General in section 112(b) to issue guidelines and regulations to interpret and implement SORNA as a whole." 72 Fed. Reg. at 8895, 8896. This statement is an acknowledgement by the Attorney General that subsection (d) not only granted the

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In explaining the reason for the Interim Rule, the Attorney General announced that "[t]he Department of Justice is publishing this interim rule to specify *that* the requirements of [SORNA] apply to sex offenders convicted . . . prior to the enactment of that Act." *Id.* at 8894 (emphasis added). The Attorney General also noted that he "exercise[d] his authority under [§ 16913(d)] of SORNA to specify th[e] scope of application for SORNA. . . ." *Id.* at 8896.

The substance of the Interim Rule and the Attorney General's above statements demonstrate that he understood his authority "to specify the applicability of [SORNA] . . . to [pre-SORNA offenders]" as the authority to determine whether SORNA's scope would be expanded to cover such offenders.[15]

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authority to specify the applicability of SORNA, but other matters as well. *Id.*

[15] In the commentary to the Interim Rule, the Attorney General pressed the Department of Justice's litigation position: that SORNA applied to pre-enactment offenders upon its enactment. *See, e.g., United States v. Madera*, 528 F.3d 852, 857-858 (11th Cir. 2008) (*per curiam*) (rejecting the government's argument that the Attorney General was "not given full discretion to determine whether SORNA would be retroactively applied to sex offenders convicted before its enactment"); *United States v. Kapp*, 487 F.Supp.2d 536, 541 (M.D. Pa. 2007) (rejecting government's argument that the "fact that Defendant's convictions pre-dated SORNA has no bearing on whether they had an obligation under [§ 16913(d)] to update their registries"). The Attorney General pointedly stated that:

> sex offenders with predicate convictions predating SORNA who do not wish to be subject to the SORNA

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Reading the first clause of subsection (d) as granting authority to the Attorney General to determine *whether* SORNA applies to pre-SORNA sex offenders, adheres with the Attorney General's authority, in the second clause of the subsection, to prescribe *how* SORNA would be applied to pre-SORNA sex offenders, along with others who were unable to comply with the law's initial registration requirement. An interpretation of the first clause of subsection (d) as also granting authority to determine *how* SORNA would apply would impermissibly render the language in the first clause superfluous and violate "a cardinal principle of statutory construction," *Williams v. Taylor*, 529 U.S. 362, 404 (2000), that courts "give effect, if possible, to every clause and word of a statute[.]" *United States v. Menasche*,

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registration requirements, or who wish to avoid being held to account for having violated those requirements, have not been barred from attempting to devise arguments that SORNA is inapplicable to them, e.g., because a rule confirming SORNA's applicability has not been issued. This rule forecloses such claims by making it indisputably clear that SORNA applies to all sex offenders (as the Act defines that term) regardless of when they were convicted.

72 Fed. Reg. at 8896.

The Attorney General explained that he was exercising his authority to specify that SORNA applied, "regardless of *whether* SORNA would apply with such scope absent this rule," *id.* (emphasis added), revealing that, irrespective of his stated belief that "considered facially" SORNA applied to all sex offenders, *id.*, he also understood the authority granted in § 16913(d) concerned *whether* SORNA would apply.

348 U.S. 528, 538-539 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883); *see also Wash. Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879) ("As early as in Bacon's Abridgement, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'"). There is no reason to read the statute to authorize the Attorney General to do the same thing twice; nor is there a basis for reading the first clause of subsection (d) out of the statute.

In sum, the meaning of the first clause of § 16913(d) is plain: It delegates to the Attorney General the authority to determine whether SORNA should be applied to sex offenders convicted before SORNA's enactment. As Justice Alito remarked in *Carr*: "The clear negative implication of that delegation is that, without such a determination by the Attorney General, the Act would not apply to those with pre-SORNA sex-offense convictions." *Carr*, 130 S. Ct. at 2246 n.6 (Alito, J., dissenting).

Accordingly, under the plain language of § 16913(d), Mr. Reynolds was not subject to SORNA's requirements until the Attorney General exercised the authority granted to him and issued a valid regulation specifying that SORNA's registration requirements applied to individuals, like Mr. Reynolds, who were convicted of a sex offense prior to SORNA's enactment. As this Court recently stated with respect to SORNA,

> [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the statutory language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.

Carr, 130 S. Ct. at 2241-2242 (quoting *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006)).[16]

b. A contrary reading of subsection (d) fails.

The majority of the Courts of Appeals to construe § 16913(d) have found that SORNA did not apply to pre-enactment offenders until the Attorney General exercised his authority and so specified. *See Johnson*,

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[16] In *Carr*, this Court interpreted the enforcement provision of SORNA, 18 U.S.C. § 2250(a), which makes it a federal crime, punishable by up to ten years' imprisonment, for any person who "is required to register under [SORNA]," "travels in interstate or foreign commerce," and "knowingly fails to register or update a registration." 18 U.S.C. § 2250(a). In reaching the conclusion that the present-tense verb "travels" in § 2250(a)(1)(B) did not encompass pre-enactment travel, the Court relied on the statute's plain language, which it found supported by the provision's statutory context. *Carr*, 130 S. Ct. at 2235-2237, 2242. In so doing, the Court rejected the government's efforts to justify construing SORNA to extend to pre-SORNA travel by "invok[ing] one of SORNA's underlying purposes: to locate sex offenders who had failed to abide by their registration obligations." *Id.* at 2240-2241.

632 F.3d at 922; *Valverde*, 628 F.3d at 1161; *United States v. Cain*, 583 F.3d 408, 414-419 (6th Cir. 2009); *United States v. Hatcher*, 560 F.3d at 226-229; *United States v. Dixon*, 551 F.3d 578, 585 (7th Cir. 2008); *Madera*, 528 F.3d at 856-859. A minority found that § 16913(d) did not delegate a decision about SORNA's applicability to all pre-SORNA offenders to the Attorney General. *See United States v. Hinckley*, 550 F.3d 926, 929-935 (10th Cir. 2008); *United States v. May*, 535 F.3d 912, 916-919 (8th Cir. 2008); *Reynolds*, 380 F. App'x at 126; *Fuller*, 627 F.3d at 504-505; and *DiTomasso*, 621 F.3d at 24-25. The decisions of these courts run contrary to the canons of construction and the teachings of this Court.

Rather than give the language of § 16913(d) its plain meaning, some of these courts created ambiguity by removing the statutory language from context and by reading § 16913(d) as if it did not contain two distinct and clearly defined clauses. Instead of looking to the specific commands of § 16913(d), these courts are guided only by what they perceive is required to fulfill the congressional purpose underlying SORNA.

Section 16913(d) reads as follows:

> The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for

> other categories of sex offenders who are unable to comply with subsection (b).

42 U.S.C. § 16913(d).

As discussed above, the first clause of § 16913(d) unambiguously grants the Attorney General the authority to specify whether the SORNA registration requirements apply to those persons convicted before SORNA's enactment. The second clause permits the Attorney General to prescribe rules for "any such offenders and for other categories of offenders who are unable to comply with subsection (b)," a construction that plainly differentiates "any such [pre-enactment] offenders" from "other categories" of offenders who are unable to comply with subsection (b).

Some courts found "the use of the statutory terminology '*other* categories of sex offenders who are unable to comply with subsection (b) of this section'" in the second clause of § 16913(d) created ambiguity by providing an alternate meaning to subsection (d), *i.e.*, that "'offenders convicted before July 27, 2006' are [ ] included within the 'other categories of offenders.'" *May*, 535 F.3d at 918; *see also Hinckley*, 550 F.3d at 932. The supposed ambiguity in the second clause of subsection (d), the *May* court found, "triggers the permissible reference to [§ 16913(d)'s] title." *May*, 535 F.3d at 918 (citing *I.N.S. v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991)); *see also Hinckley*, 550 F.3d at 933 (ambiguity "requires us to look beyond the language to the

construction of the statute, the context and subtitle of the subsection").

In these courts' view, when the title and the "overall design of SORNA" are considered, subsection (d) is "very narrow in scope" and applies only to "currently unregistered sex offenders literally *unable* to comply with subsection (b) because of the age of their convictions. . . ." *May*, 535 F.3d at 918-919 (emphasis in original); *see also Hinckley*, 550 F.3d at 933 ("subsection (d)'s subheading . . . clearly limits it to the initial registration requirements in subsection (b)"). Finding that sex offenders who were able to register under state laws prior to SORNA's enactment were not "unable to comply with subsection (b) of [§ 16913(d)]," the courts concluded that the registration requirements in §§ 16913(a)-(c) applied to such offenders upon SORNA's enactment. *May*, 535 F.3d at 919; *Hinckley*, 550 F.3d at 935.

The first problem with the analyses of these courts is that they read § 16913(d) "in isolation and out of context[.]" *May*, 535 F.3d at 918 (quoting *United States v. Beasley*, Crim. No. 07-CR-115, 2007 WL 3489999, *6 (N.D. Ga. Oct. 10, 2007)); *see also Hinckley*, 550 F.3d at 931, thereby violating "a fundamental canon of statutory construction" that the words of a statute must be read in context. *Davis*, 489 U.S. at 809. Even if this were not the case, the analyses of these courts suffer from other substantial problems.

Initially, the phrase "other categories of sex offenders unable to comply with subsection (b)" – even when read in isolation – is not reasonably interpreted to modify all pre-enactment offenders. The words "any such offender," in the second main clause of subsection (d), indisputably refer back to "sex offenders convicted before the enactment of this chapter" in the first clause. By referring to "any such offenders" and "other categories of sex offenders," Congress clearly identified two groups for whom the Attorney General had the authority to prescribe rules under the second clause – one which it specifically identified (pre-enactment offenders) and one it did not (other categories of offenders).

The use of the word "other" does not inject ambiguity; rather, it simply signifies that there is a similarity between the two groups of offenders, specified in the descriptive clause "who are unable to comply with subsection (b)." *Cf. Begay v. United States*, 553 U.S. 137, 150-151 (2008) (Scalia, J., concurring) (explaining that the phrase "otherwise involves conduct that presents a serious potential risk of physical injury to another" as "signif[ying] a similarity between the enumerated and unenumerated crimes" in the preceding clause of 18 U.S.C. § 924(e)). This construction not only makes sense, but also reflects Congress' understanding that there are likely categories of offenders, other than pre-enactment

offenders, who would be unable to comply with § 16913(b) of SORNA.[17]

Thus, even if the second clause of subsection (d) were ambiguous because the word "other" renders it susceptible to an alternate interpretation – which it does not – it would not affect the plain meaning of the first clause, which involves the separate and distinct authority to specify the applicability of SORNA.

The courts' ultimate conclusion that pre-SORNA registrations under state procedures are the equivalent of "initial registrations" that comply with subsection (b) of § 16913, a position the government has consistently pressed, is foreclosed by this Court's recent analysis in *Carr*.[18]

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[17] The *May* and *Hinckley* courts' construction, that pre-enactment offenders are included among the other categories of offenders for whom the Attorney General's authority is limited to prescribing rules, renders most of the language of § 16913(d) superfluous. If Congress had intended such meaning, it would simply have stated, "the Attorney General shall have the authority to prescribe rules for offenders who are unable to comply with subsection (b)."

[18] The Third Circuit also erroneously equated state registrations with "initial registrations" under § 16913(b) of SORNA. *Shenandoah*, 595 F.3d at 163. Applying the faulty reasoning of *Shenandoah*, the court below found that Mr. Reynolds lacked standing to challenge the Interim Rule because it did not apply to him and others who were "required to register as a sex offender under state law before SORNA was enacted – and [were] in fact so registered. . . ." (J.A. 64.).

In *Carr*, the government argued that the first element of § 2250, which can only be satisfied when a person "is required to register under [SORNA]," is "merely a shorthand way of identifying those persons who have a sex offense conviction. . . ." *Carr*, 130 S. Ct. at 2235. Not only did the Court find that such a construction would mean that "Congress used 12 words and two implied cross-references to establish that the first element of § 2250 is that a person has been convicted of a sex offense," but it also pointed out that "a sex offender could not have been required to register *under SORNA* until SORNA became the law." *Id.* (emphasis added).

Similarly, a sex offender could not have been able "to comply with subsection (b) of [§ 16913]" until § 16913(b) became the law. To adopt a construction of the phrase "unable to comply with subsection (b)" as "unable to register, prior to SORNA, in the jurisdiction where convicted," would require the Court to accept what it rejected in *Carr* – that Congress cross-referenced subsection (b) for no reason and that the precise statutory text is "merely 'a shorthand way of identifying'" offenders who could not register in their respective jurisdictions. *See id.*

"Such contortions can scarcely be called 'shorthand.'" *Id.* Just as it was "far more sensible" to conclude that Congress meant what it wrote in § 2250(a), it is far more sensible here to conclude that Congress meant what it wrote in subsection (d): that the Attorney General's authority to prescribe rules

applied to sex offenders who are "unable to comply with subsection (b)."

Not all of the courts that have rejected the plain meaning of subsection (d) adopted the "shorthand" argument. Some have resorted to "that ever-ready refuge from the hardships of statutory text, the (judicially) perceived statutory purpose," *Begay*, 553 U.S. at 152 (Scalia, J., concurring), and found that interpreting subsection (d) as a delegation to the Attorney General to determine whether SORNA should be applied to pre-SORNA offenders would contravene SORNA's statutory purpose.[19] *See, e.g., DiTomasso*, 621 F.3d at 24; *Fuller*, 627 F.3d at 506.

This is clear in *DiTomasso*, where the court stated: "In our judgment, a different canon of construction dominates the interpretive landscape in this instance. When congressional intent is clear and a statute plausibly can be read to effectuate that

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[19] These courts found support for their interpretation in the general rule that "a law takes effect on the date of its enactment absent a clear [congressional] direction to the contrary." *Fuller*, 627 F.3d at 506 (citing *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991)); *see also DiTomasso*, 621 F.3d at 23. As discussed *supra* at 21-30, § 16913(d) specifically addresses the application of SORNA's registration requirements to pre-SORNA offenders and, by delegating a decision about whether the requirements in subsections (a)-(c) apply to such offenders, it provides a clear direction that SORNA did not apply to them on the day of enactment. Giving effect to subsection (d)'s plain language recognizes another well-settled rule, that a "specific provision controls over one of more general application." *Gozlon-Peretz*, 111 S. Ct. at 407.

intent, that reading must prevail over a more semantically correct reading of the statutory language." *DiTomasso*, 621 F.3d at 23 (citing *In re Hill*, 562 F.3d 29, 32 (1st Cir. 2009)). Similarly in *Fuller*, the court found that because "Congress's stated purpose in enacting SORNA was to create 'a *comprehensive* national system for the registration of [sex] offenders' . . . reading subsection (d) as Fuller does would undermine the entire purpose of the statute." *Id.* at 505.

According to *Fuller*, the

> power "to specify the applicability of the requirements of [SORNA]" refers to [the Attorney General's] authority to work out the complications that may arise in the application of a new federal criminal law to an already existent class of offenders, the myriad permutations of which Congress chose not to address in the Act itself, in order to ensure an efficient and "comprehensive" national sex offender registration system.[20]

Id. at 506.

Although the court in *DiTomasso* also concluded that "Congress did not contemplate a statutory

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[20] As discussed *supra* on 25-26, *Fuller*'s construction unreasonably construes both clauses of subsection (d) as involving only "how" SORNA would be applied to pre-SORNA offenders. 627 F.3d at 506, 507. The court acknowledged that its interpretation of subsection (d) rendered the second clause of the provision superfluous, but found that "such surplusage can be forgiven in light of SORNA's overarching purpose and its general structure." *Id.* 627 F.3d at 507 (citing *Lamie v. U.S. Tr.*, 540 U.S. 536 (2004)).

scheme in which the application of the general rules limned in subsections (a), (b), and (c) to previously convicted sex offenders would hinge on action by the Attorney General[,]" it simultaneously found that Congress authorized the Attorney General to determine *whether* SORNA would apply to "those previously convicted offenders who were unable to comply with subsection (b)," and "narrow SORNA's sweep if and to the extent that he concluded that specific situations invite such narrowing." *Id.* at 23, 25. One such situation, the court explained, is where "problematic permutations [] might arise with respect to some previously convicted offenders." *Id.* at 25.

Fuller did not fully embrace *DiTomasso*'s construction, and insisted that subsection (d) pertained only to *how* SORNA would be applied. *Fuller*, 627 F.3d at 505. However, it recognized the Attorney General's substantial discretion "to work out the complications that may arise in the application of a new federal criminal law to an already existent class of offenders, the myriad permutations of which Congress chose not to address in the Act itself[.]" *Id.*

By construing subsection (d) as authorizing the Attorney General to provide relief from SORNA's registration requirements because of the myriad of problematic permutations that might arise in applying SORNA to pre-SORNA offenders, these courts implicitly acknowledge that congressional purpose does not demand that SORNA be applied immediately to all

offenders, irrespective of when they were convicted.[21] They also recognize the unique position of the Attorney General in addressing the myriad of problems that could arise from applying SORNA to pre-enactment offenders and in ensuring SORNA's effectiveness, which makes the delegation eminently reasonable. That is, by delegating to the Attorney General the authority to specify SORNA's applicability to pre-enactment offenders Congress reasonably delegated the decision to someone who could ensure that application in an area that was rife with potential problems would be effective.

Indeed, had Congress made SORNA immediately applicable to pre-enactment offenders, it risked that its "comprehensive national system for the registration of [sex offenders]," § 16901, would be ineffective as to these offenders. Given SORNA's objectives, the risk of implementing an ineffective system far outweighed the risk identified by the courts in *DiTomasso* and *Fuller*, *i.e.*, that the Attorney General might not exercise the discretion granted in subsection (d), thereby leaving all pre-enactment offenders

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[21] The courts assume that Congress's stated purpose for enacting SORNA, "a comprehensive national system for the registration of [sex] offenders" § 16901, necessarily required the immediate application of SORNA's registration requirements to all sex offenders. Such "vague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the specific issue under consideration." *Carr*, 130 S. Ct. at 2241 (citing *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993)).

beyond SORNA's reach. *DiTomasso*, 621 F.3d at 24; *Fuller*, 627 F.3d at 505. As the Sixth Circuit noted in *Cain*, any suggestion that "the Attorney General might not require any pre-SORNA offenders to register[,] disregards the political reality that an Attorney General was unlikely to do so." *Cain*, 583 F.2d 408, 417.

Congress was clear, specific, and consistent in § 16913(d) – it left it to the informed discretion of the Attorney General to determine whether to apply the requirements of its new, national scheme to pre-enactment offenders. Its delegation was reasonable in light of its stated purpose and the expectation that applying SORNA to pre-enactment offenders would involve complications it could not address through legislation. Congress not only wanted a comprehensive national system, it also wanted an effective one. The delegation of authority in subsection (d), which left a determination about SORNA's applicability to pre-enactment offenders to the Attorney General, was specifically and intentionally designed to ensure SORNA's effectiveness with respect to this class of offenders.

Those courts which found that giving effect to subsection (d)'s plain language would contravene SORNA's purpose "confuse[] a general goal of SORNA with the specific purpose of" § 16913(d). *Carr*, 130 S. Ct. at 2240. Their construction is neither supported by the provision's statutory language nor compelled by SORNA's broader statutory purpose.

c. Principles of statutory construction as well as section 16913(d)'s legislative history confirm its plain meaning.

The plain language of § 16913(d), delegating exclusive and full authority to the Attorney General to determine whether SORNA applies to those convicted of sex offenses prior to SORNA's enactment, is essential to the effectiveness of SORNA and does not conflict with "clearly expressed congressional intent" to create a comprehensive system. *Hatcher*, 560 F.3d at 229. In fact, "[s]uch a system enables the Attorney General to balance administrative constraints with the goal of complete coverage." *Cain*, 583 F.3d at 417.

A more limited grant of authority to the Attorney General is inconsistent with Congress' desire to establish "a comprehensive national system" for the registration of sex offenders. 42 U.S.C. § 16901. SORNA's legislative sponsors "'consistently and emphatically expressed displeasure with the existing state-by-state patchwork of sex offender laws and stated their intention to replace them with a uniform, comprehensive federal registration statute.'" *Cain*, 583 F.3d at 419 (quoting *Hinckley*, 550 F.3d at 947). That there was concern about "coverage of the 'approximately 500,000 sex offenders registered under various and patchwork state regimes at the time of the bill's enactment'" does not mean that Congress "expected such coverage to occur automatically by the statute rather than, as the statutory text provides, by the Attorney General's regulation." *Id.* Indeed, an examination of § 16913(d), within its broader statutory

context and in light of its legislative history, confirms that Congress intended SORNA's application to pre-enactment offenders to be determined by the Attorney General.

i. Statutory context supports the plain meaning of section 16913(d).

Viewing § 16913(d) in its statutory context, and with regard to SORNA's statutory purpose, confirms that Congress delegated the authority to determine the applicability of SORNA's registration requirements "to sex offenders convicted before the enactment[,]" to the Attorney General under § 16913(d). The delegation of authority to specify the applicability of SORNA to all pre-SORNA sex offenders is not only intentionally broad, but also is consistent with SORNA's design and purpose. The delegation of authority to determine whether SORNA applies to pre-SORNA offenders is also understandable in light of congressional directives throughout the statute, which make the Attorney General responsible for nearly every aspect of SORNA.

For example, § 16912, the SORNA provision immediately preceding § 16913, requires the Attorney General to "issue guidelines and regulations to interpret and implement this subchapter." 42 U.S.C. § 16912(b). Although § 16912(b) mandates action by the Attorney General, the responsibility given under that provision is quite broad in that it leaves a myriad of determinations, which could delay or otherwise

impact the application of SORNA, to the discretion of the Attorney General. Similarly, under § 16924(b), the Attorney General is authorized to allow jurisdictions to delay implementation of SORNA, which likewise affects the immediate application of SORNA.

The responsibilities given the Attorney General under §§ 16912(b) and 16924(b), which affect the implementation of SORNA for all sex offenders, is comparable to the authority granted in § 16913(d), which permits the Attorney General to determine whether SORNA would be applied to a subset of sex offenders, *viz.*, those with pre-SORNA convictions.

In addition, recognizing the expertise of the Attorney General, Congress delegated other substantial responsibilities to his office, including:

- directing the Attorney General to "maintain a national database," known as the "National Sex Offender Registry," 42 U.S.C. § 16919, and authorizing the Attorney General to add to the information required in the sex offender registry by both offenders and jurisdictions, *see* 42 U.S.C. §§ 16914(a)(7) and (b)(8);

- directing the Attorney General to maintain "the Dru Sjodin National Sex Offender Public Website" and requiring "each jurisdiction" to "participate in that website as provided by the Attorney General," who will also direct jurisdictions to exempt certain information

from disclosure, 42 U.S.C. §§ 16918(a), 16918(b), and 16920(a);

- establishing "within the Department of Justice, under the general authority of the Attorney General, an Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking" referred to as the "SMART Office[,]" which is authorized to, *inter alia*, "administer the standards for the sex offender registration and notification program set forth in" the Adam Walsh Act, 42 U.S.C. § 16945;[22]

- authorizing the Attorney General to consider whether a jurisdiction is unable to implement SORNA because implementation "would place the jurisdiction in violation of its constitution, as determined by a ruling of the jurisdiction's highest court." 42 U.S.C. § 16925(b)(1), and;

- mandating that the "Attorney General shall use the resources of Federal law enforcement, including the United States Marshals Service, to assist jurisdictions in locating and apprehending sex offenders who violate sex offender registration requirements," 42 U.S.C. § 16941(a).

In short, Congress made the Attorney General responsible for nearly every aspect of

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[22] *About SMART*, http://www.ojp.usdoj.gov/smart/about.htm.

SORNA's implementation, enforcement, and administration.[23] When considered in its statutory context, as it must be, *Davis*, 489 U.S. at 809, the delegation of authority in § 16913(d) to specify the applicability of SORNA's registration requirements to pre-SORNA offenders is consistent with SORNA's "overall statutory scheme," *id.* Delegating a decision about the applicability of SORNA to pre-SORNA offenders – an act which would require the expertise and considered judgment of the Attorney General to ensure an effective registration system – best reflects the congressional purpose "to establish[] a comprehensive national system for the registration of [sex]

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[23] Congress delegated other responsibilities related to SORNA to the Attorney General, including:

1) establishment and maintenance of a system for informing jurisdictions about persons entering the United States who are required to register under SORNA, including providing direction to the Secretary of State and the Secretary of Homeland Security under 42 U.S.C. § 16928;

2) creation and maintenance of the Project Safe Childhood program under 42 U.S.C. § 16942;

3) expanding "training efforts with Federal, State and local law enforcement officers and prosecutors" including "facilitating meetings involving corporations that sell computer hardware or provide services to the general public related to use of the Internet" under 42 U.S.C. §§ 16944(a)(1) and (2); and

4) "fingerprint-based checks of the national crime information databases" pursuant to the "School Safely Acquiring Faculty Excellence Act of 2006" upon request of a state. 42 U.S.C. §§ 16962(a) and (b).

offenders." 42 U.S.C. § 16901. Thus, authority granted to the Attorney General in § 16913(d) is typical of, rather than at odds with, SORNA.

In fact, given the scope of the Attorney General's responsibilities under SORNA, it was eminently reasonable for Congress to leave to the Attorney General's discretion a determination about whether SORNA should be applied to pre-SORNA offenders. Given the other substantial decisions left to the Attorney General, he was in the best position to determine whether and when SORNA's registration requirements should be applied to the 500,000 pre-SORNA offenders to ensure that its application would be effective.[24]

In light of SORNA's overall structure, there is little reason to doubt that Congress intended § 16913(d) to do exactly what it says: to delegate the authority to determine whether SORNA's newly enacted registration requirements would apply to offenders whose convictions predated enactment.

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[24] In addition, as the court noted in *Johnson*, "giving the Attorney General authority to determine the statute's application to pre-enactment offenders would allow an agency that is an expert in criminal law to negotiate the details of retroactivity and the interactions between the pre-existing state systems." *Johnson*, 632 F.3d at 926.

ii. Legislative history supports SORNA's plain meaning that the registration requirements did not apply to sex offenders convicted before enactment until the Attorney General exercised his authority to specify their applicability.

The text of § 16913(d) grants the Attorney General the authority to specify whether, when and how SORNA would apply to sex offenders with pre-SORNA convictions. *See* 42 U.S.C. § 16913(d). "Given the straightforward statutory command, there is no reason to resort to legislative history." *Gonzales*, 520 U.S. at 6 (citing *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992)). Nevertheless, consideration of SORNA's limited legislative history confirms the plain meaning of § 16913(d).

In 2005, the Senate proposed its own sex offender registration legislation to SORNA in Senate Bill 1086. After the Senate Judiciary Committee marked it up, the proposed legislation contained a provision similar to SORNA's § 16913(d), titled "Retroactive Application." S.1086, 109th Cong. § 104(a)(8) (2005). This section debuted the phrase "the Attorney General shall have the authority to specify the applicability of the requirements of this title" and provided:

> (8) RETROACTIVE APPLICATION. –
>
> The Attorney General *shall have the authority to* –

> (A) *specify the applicability of* the requirements of this title to individuals who are covered individuals based on a conviction or sentencing that occurred prior to the date of enactment or who are, as of the date of enactment of this Act, incarcerated or under a non-incarcerative sentence for some other offense;
>
> (B) *specify the applicability of* the requirements of this title to all other individuals who are covered individuals based on a conviction or sentencing that occurred prior to the enactment date of enactment of this Act or the implementation of the requirements of this title by a participating State; and
>
> (C) *specify procedures and methods for* the registration of individuals to whom the requirements of this title apply pursuant to subparagraph (A) or (B).

Id. (emphasis added).

The above-quoted language, which grants authority to the Attorney General to specify the applicability of the legislation to those persons convicted before its enactment, closely tracks the language ultimately enacted by Congress in 2006 in § 16913(d) of SORNA. 42 U.S.C. § 16913(d). Furthermore, the language in S.1086 highlights the distinction between the phrases "specify the applicability" and "specify procedures and methods." S.1086, 109th Cong. § 104(a)(8). Like SORNA, S.1086 granted the Attorney General two

separate authorities in this context: 1) to determine *whether* the sex offender registration provisions applied to individuals who were convicted or sentenced before enactment (in § 104(a)(8)(A) and (B) above) and; 2) to determine *how* to register individuals convicted or sentenced before enactment (in § 104(a)(8)(C) above). *Id.* "Subsection 16913(d) reads like a revised version of this provision of Senate Bill 1086, suggesting that Congress did not intend any substantive change between those provisions." *Cain*, 583 F.3d at 418.

This favorable comparison is strong evidence that the text of § 16913(d), enacted less than one year after a similar bill passed the Senate in May 2005, expresses the legislative intent to grant authority to the Attorney General to determine whether SORNA applies to those with pre-SORNA convictions. *See* S.1086, 109th Cong. § 104(a)(8). As noted by this Court, "[i]n the absence of a 'clearly expressed legislative intention to the contrary,' the language of the statute itself 'must ordinarily be regarded as conclusive.'"[25] *United States v. James*, 478 U.S. 597, 606 (1986).

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[25] Another piece of proposed legislation, The Children's Safety Act of 2005, passed the House of Representatives in September 2005 and included a subsection entitled "Retroactive Duty to Register." H.R. 3132, 109th Cong. § 113 (2005). Section 113 pertained generally to the registration of sex offenders whose convictions predated the proposed legislation. *Id.* It did not delegate any authority to the Attorney General. *Id.* Instead, it provided that "the Attorney General *shall prescribe a method*

(Continued on following page)

Because the legislative record confirms that Congress intended to delegate to the Attorney General *both* the authority to determine *whether* and *how* SORNA would be applied to pre-enactment offenders, the language of § 16913(d) must be given its plain meaning.[26]

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for the registration of sex offenders convicted before the enactment of this Act or its effective date in a particular jurisdiction." *Id.* (emphasis added).

The difference between the text of the Children's Safety Act, which was not enacted, and SORNA is significant, because it reflects an intentional policy choice and demonstrates that Congress's choice of words "was no drafting inadvertence." *United States v. James*, 478 U.S. 597, 608 (1986), abrogated on other grounds by *Cent. Green Co. v. United States*, 531 U.S. 425, 436 (2001); *see Russello v. United States*, 464 U.S. 16, 23-24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.").

[26] If, after employing all of the canons of construction, any question remains about the meaning of subsection (d), strict construction and the rule of lenity demand that the unusual reading of SORNA's delegation provision, pressed by the government in this case and in others, should not be adopted. *United States v. Santos*, 553 U.S. 507, 514 (2008) ("[T]he rule of lenity, requires ambiguous criminal statutes to be interpreted in favor of the defendants subject to them."). A "tie must go to the defendant." *Id.*

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Court of Appeals for the Third Circuit and remand for consideration of the merits of Mr. Reynolds' challenge to the validity of the Attorney General's Interim Rule.

Respectfully submitted,

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APPENDIX A

TITLE 42 –
THE PUBLIC HEALTH AND WELFARE

* * *

CHAPTER 151 –
CHILD PROTECTION AND SAFETY

* * *

SUBCHAPTER I –
SEX OFFENDER REGISTRATION AND NOTIFICATION

§ 16901. Declaration of purpose

In order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below, Congress in this chapter establishes a comprehensive national system for the registration of those offenders:

* * *

PART A –
SEX OFFENDER REGISTRATION AND NOTIFICATION

§ 16911. Relevant definitions, including Amie Zyla expansion of sex offender definition and expanded inclusion of child predators

In this subchapter the following definitions apply:

(1) *Sex offender*

The term "sex offender" means an individual who was convicted of a sex offense.

* * *

(9) *Sex offender registry*

The term "sex offender registry" means a registry of sex offenders, and a notification program, maintained by a jurisdiction.

(10) *Jurisdiction*

The term "jurisdiction" means any of the following:

(A) A State.

(B) The District of Columbia.

(C) The Commonwealth of Puerto Rico.

(D) Guam.

(E) American Samoa.

(F) The Northern Mariana Islands.

(G) The United States Virgin Islands.

(H) To the extent provided and subject to the requirements of section 16927 of this title, a federally recognized Indian tribe.

* * *

§ 16912. Registry requirements for jurisdictions

(a) *Jurisdiction to maintain a registry*

Each jurisdiction shall maintain a jurisdiction-wide sex offender registry conforming to the requirements of this subchapter.

(b) *Guidelines and regulations*

The Attorney General shall issue guidelines and regulations to interpret and implement this subchapter.

* * *

§ 16913. Registry requirements for sex offenders

(a) *In general*

A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

(b) *Initial registration*

The sex offender shall initially register –

(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or

(2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

(c) *Keeping the registration current*

A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.

(d) *Initial registration of sex offenders unable to comply with subsection (b)*

The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).

(e) *State penalty for failure to comply*

Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex

offender to comply with the requirements of this subchapter.

(Pub. L. 109–248, title I, § 113, July 27, 2006, 120 Stat. 593.)

REFERENCES IN TEXT

This subchapter, referred to in subsecs. (d) and (e), was in the original "this title", meaning title I of Pub. L. 109-248, July 27, 2006, 120 Stat. 590, known as the Sex Offender Registration and Notification Act. For complete classification of title I to the Code, see Short Title note set out under section 16901 of this title and Tables.

This chapter, referred to in subsec. (d), was in the original "this Act", meaning Pub. L. 109-248, July 27, 2006, 120 Stat. 587, known as the Adam Walsh Child Protection and Safety Act of 2006, which was approved July 27, 2006. For complete classification of this Act to the Code, see Short Title note set out under section 16901 of this title and Tables.

§ 16914. Information required in registration

(a) *Provided by the offender*

The sex offender shall provide the following information to the appropriate official for inclusion in the sex offender registry:

* * *

(7) Any other information required by the Attorney General.

(b) *Provided by the jurisdiction*

The jurisdiction in which the sex offender registers shall ensure that the following information is included in the registry for that sex offender:

* * *

(8) Any other information required by the Attorney General.

* * *

§ 16915. Duration of registration requirement

* * *

(b) *Reduced period for clean record*

(1) *Clean record*

The full registration period shall be reduced as described in paragraph (3) for a sex offender who maintains a clean record for the period described in paragraph (2) by –

* * *

(D) successfully completing of [ ] an appropriate sex offender treatment program certified by a jurisdiction or by the Attorney General.

* * *

§ 16915a. Direction to the Attorney General

(a) *Requirement that sex offenders provide certain Internet related information to sex offender registries*

The Attorney General, using the authority provided in section 114(a)(7) of the Sex Offender Registration and Notification Act [42 U.S.C. 16914(a)(7)], shall require that each sex offender provide to the sex offender registry those Internet identifiers the sex offender uses or will use of any type that the Attorney General determines to be appropriate under that Act [42 U.S.C. 16901 et seq.] . . .

* * *

(b) *Timeliness of reporting of information*

The Attorney General, using the authority provided in section 112(b) of the Sex Offender Registration and Notification Act [42 U.S.C. 16912(b)], shall specify the time and manner for keeping current information required to be provided under this section.

(c) *Nondisclosure to general public*

The Attorney General, using the authority provided in section 118(b)(4) of the Sex Offender Registration and Notification Act [42 U.S.C. 16918(b)(4)], shall exempt from disclosure all information provided by a sex offender under subsection (a).

(d) *Notice to sex offenders of new requirements*

The Attorney General shall ensure that procedures are in place to notify each sex offender of changes in requirements that apply to that sex offender as a result of the implementation of this section.

* * *

§ 16915b. Checking system for social networking websites

(a) *In general*

(1) *Secure system for comparisons*

The Attorney General shall establish and maintain a secure system that permits social networking websites to compare the information contained in the National Sex Offender Registry with the Internet identifiers of users of the social networking websites, and view only those Internet identifiers that match. The system –

* * *

(B) shall use secure procedures that preserve the secrecy of the information made available by the Attorney General, including protection measures that render the Internet identifiers and other data elements indecipherable.

(2) *Provision of information relating to identity*

Upon receiving a matched Internet identifier, the social networking website may make a request of the

Attorney General for, and the Attorney General shall provide promptly, information related to the identity of the individual that has registered the matched Internet identifier. This information is limited to the name, sex, resident address, photograph, and physical description.

(b) *Qualification for use of system*

A social networking website seeking to use the system shall submit an application to the Attorney General which provides –

* * *

(7) such other information or attestations as the Attorney General may require to ensure that the website will use the system –

(A) to protect the safety of the users of such website; and

(B) for the limited purpose of making the automated comparison described in subsection (a).

(c) *Searches against the system*

(1) *Frequency of use of the system*

A social networking website approved by the Attorney General to use the system may conduct searches under the system as frequently as the Attorney General may allow.

(2) *Authority of Attorney General to suspend use*

The Attorney General may deny, suspend, or terminate use of the system by a social networking website . . .

(3) *Limitation on release of Internet identifiers*

(A) *No public release*

Neither the Attorney General nor a social networking website approved to use the system may release to the public any list of the Internet identifiers of sex offenders contained in the system.

(B) *Additional limitations*

The Attorney General shall limit the release of information obtained through the use of the system established under subsection (a) by social networking websites approved to use such system.

* * *

(D) *Rule of construction*

This subsection shall not be construed to limit the authority of the Attorney General under any other provision of law to conduct or to allow searches or checks against sex offender registration information.

(4) *Payment of fee*

A social networking website approved to use the system shall pay any fee established by the Attorney General for use of the system.

* * *

§ 16917. Duty to notify sex offenders of registration requirements and to register

(a) *In general*

An appropriate official shall, shortly before release of the sex offender from custody, or, if the sex offender is not in custody, immediately after the sentencing of the sex offender, for the offense giving rise to the duty to register –

(1) inform the sex offender of the duties of a sex offender under this subchapter and explain those duties;

(2) require the sex offender to read and sign a form stating that the duty to register has been explained and that the sex offender understands the registration requirement; and

(3) ensure that the sex offender is registered.

(b) *Notification of sex offenders who cannot comply with subsection (a)*

The Attorney General shall prescribe rules for the notification of sex offenders who cannot be registered in accordance with subsection (a).

* * *

§ 16918. Public access to sex offender information thr gh the Internet

(a) *In general*

* * *

. . . The jurisdiction shall also include in the design of its Internet site all field search capabilities needed for full participation in the Dru Sjodin National Sex Offender Public Website and shall participate in that website as provided by the Attorney General.

(b) *Mandatory exemptions*

A jurisdiction shall exempt from disclosure –

* * *

(4) any other information exempted from disclosure by the Attorney General.

(c) *Optional exemptions*

A jurisdiction may exempt from disclosure –

* * *

(4) any other information exempted from disclosure by the Attorney General.

* * *

§ 16919. National Sex Offender Registry

(a) *Internet*

The Attorney General shall maintain a national database at the Federal Bureau of Investigation for each sex offender and any other person required to register in a jurisdiction's sex offender registry. The database shall be known as the National Sex Offender Registry.

(b) *Electronic forwarding*

The Attorney General shall ensure (through the National Sex Offender Registry or otherwise) that updated information about a sex offender is immediately transmitted by electronic forwarding to all relevant jurisdictions.

* * *

§ 16920. Dru Sjodin National Sex Offender Public Website

(a) *Establishment*

There is established the Dru Sjodin National Sex Offender Public Website (hereinafter in this section referred to as the "Website"), which the Attorney General shall maintain.

(b) *Information to be provided*

* * *

. . . The Website shall allow the public to obtain relevant information for each sex offender by a single query for any given zip code or geographical radius set by the user in a form and with such limitations as may be established by the Attorney General and shall have such other field search capabilities as the Attorney General may provide.

* * *

§ 16921. Megan Nicole Kanka and Alexandra Nicole Zapp Community Notification Program

(a) *Establishment of Program*

There is established the Megan Nicole Kanka and Alexandra Nicole Zapp Community Notification Program (hereinafter in this section referred to as the "Program").

(b) *Program notification*

Except as provided in subsection (c), immediately after a sex offender registers or updates a registration, an appropriate official in the jurisdiction shall provide the information in the registry (other than information exempted from disclosure by the Attorney General) about that offender to the following:

(1) The Attorney General, who shall include that information in the National Sex Offender Registry or other appropriate databases.

* * *

§ 16922. Actions to be taken when sex offender fails to comply

An appropriate official shall notify the Attorney General and appropriate law enforcement agencies of any failure by a sex offender to comply with the requirements of a registry and revise the jurisdiction's registry to reflect the nature of that failure. The appropriate official, the Attorney General, and each such law enforcement agency shall take any appropriate action to ensure compliance.

* * *

§ 16923. Development and availability of registry management and website software

(a) *Duty to develop and support*

The Attorney General shall, in consultation with the jurisdictions, develop and support software to enable jurisdictions to establish and operate uniform sex offender registries and Internet sites.

* * *

(c) *Deadline*

The Attorney General shall make the first complete edition of this software available to jurisdictions within 2 years of July 27, 2006.

* * *

§ 16924. Period for implementation by jurisdictions

* * *

(b) *Extensions*

The Attorney General may authorize up to two 1-year extensions of the deadline.

* * *

§ 16925. Failure of jurisdiction to comply

(a) *In general*

For any fiscal year after the end of the period for implementation, a jurisdiction that fails, as determined by the Attorney General, to substantially implement this subchapter shall not receive 10 percent

of the funds that would otherwise be allocated for that fiscal year to the jurisdiction under subpart 1 of part E of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3750 et seq.).

(b) *State constitutionality*

(1) *In general*

When evaluating whether a jurisdiction has substantially implemented this subchapter, the Attorney General shall consider whether the jurisdiction is unable to substantially implement this subchapter because of a demonstrated inability to implement certain provisions that would place the jurisdiction in violation of its constitution, as determined by a ruling of the jurisdiction's highest court.

(2) *Efforts*

If the circumstances arise under paragraph (1), then the Attorney General and the jurisdiction shall make good faith efforts to accomplish substantial implementation of this subchapter and to reconcile any conflicts between this subchapter and the jurisdiction's constitution. In considering whether compliance with the requirements of this subchapter would likely violate the jurisdiction's constitution or an interpretation thereof by the jurisdiction's highest court, the Attorney General shall consult with the chief executive and chief legal officer of the jurisdiction concerning the jurisdiction's interpretation of the jurisdiction's constitution and rulings thereon by the jurisdiction's highest court.

(3) *Alternative procedures*

If the jurisdiction is unable to substantially implement this subchapter because of a limitation imposed by the jurisdiction's constitution, the Attorney General may determine that the jurisdiction is in compliance with this chapter if the jurisdiction has made, or is in the process of implementing [] reasonable alternative procedures or accommodations, which are consistent with the purposes of this chapter.

* * *

§ 16926. Sex Offender Management Assistance (SOMA) program

(a) *In general*

The Attorney General shall establish and implement a Sex Offender Management Assistance program (in this subchapter referred to as the "SOMA program"), under which the Attorney General may award a grant to a jurisdiction to offset the costs of implementing this subchapter.

(b) *Application*

The chief executive of a jurisdiction desiring a grant under this section shall, on an annual basis, submit to the Attorney General an application in such form and containing such information as the Attorney General may require.

(c) *Bonus payments for prompt compliance*

A jurisdiction that, as determined by the Attorney General, has substantially implemented this subchapter not later than 2 years after July 27, 2006, is eligible for a bonus payment. The Attorney General may make such a payment under the SOMA program for the first fiscal year beginning after that determination.

* * *

(d) *Authorization of appropriations*

In addition to any amounts otherwise authorized to be appropriated, there are authorized to be appropriated such sums as may be necessary to the Attorney General, to be available only for the SOMA program, for fiscal years 2007 through 2009.

* * *

§ 16927. Election by Indian tribes

(a) *Election*

* * *

(2) *Imputed election in certain cases*

A tribe shall be treated as if it had made the election described in paragraph (1)(B) if –

* * *

(C) the Attorney General determines that the tribe has not substantially implemented the requirements of this part and is not likely to become capable of doing so within a reasonable amount of time.

* * *

§ 16928. Registration of sex offenders entering the United States

The Attorney General, in consultation with the Secretary of State and the Secretary of Homeland Security, shall establish and maintain a system for informing the relevant jurisdictions about persons entering the United States who are required to register under this subchapter. The Secretary of State and the Secretary of Homeland Security shall provide such information and carry out such functions as the Attorney General may direct in the operation of the system.

* * *

PART B – IMPROVING FEDERAL CRIMINAL LAW ENFORCEMENT TO ENSURE SEX OFFENDER COMPLIANCE WITH REGISTRATION AND NOTIFICATION REQUIREMENTS AND PROTECTION OF CHILDREN FROM VIOLENT PREDATORS

§ 16941. Federal assistance with respect to violations of registration requirements

(a) *In general*

The Attorney General shall use the resources of Federal law enforcement, including the United States Marshals Service, to assist jurisdictions in locating and apprehending sex offenders who violate sex offender registration requirements. For the purposes of section 566(e)(1)(B) of title 28, a sex offender who

violates a sex offender registration requirement shall be deemed a fugitive.

* * *

§ 16942. Project Safe Childhood

(a) *Establishment of program*

Not later than 6 months after July 27, 2006, the Attorney General shall create and maintain a Project Safe Childhood program in accordance with this section.

* * *

§ 16943. Federal assistance in identification and location of sex offenders relocated as a result of a major disaster

The Attorney General shall provide assistance to jurisdictions in the identification and location of a sex offender relocated as a result of a major disaster.

* * *

§ 16944. Expansion of training and technology efforts

(a) *Training*

The Attorney General shall –

(1) expand training efforts with Federal, State, and local law enforcement officers and prosecutors to effectively respond to the threat to children and the public posed by sex offenders who use the Internet and technology to solicit or otherwise exploit children;

(2) facilitate meetings involving corporations that sell computer hardware and software or provide services to the general public related to use of the Internet, to identify problems associated with the use of technology for the purpose of exploiting children;

(3) host national conferences to train Federal, State, and local law enforcement officers, probation and parole officers, and prosecutors regarding proactive approaches to monitoring sex offender activity on the Internet;

(4) develop and distribute, for personnel listed in paragraph (3), information regarding multidisciplinary approaches to holding offenders accountable to the terms of their probation, parole, and sex offender registration laws; and

(5) partner with other agencies to improve the coordination of joint investigations among agencies to effectively combat online solicitation of children by sex offenders.

(b) *Technology*

The Attorney General shall –

(1) deploy, to all Internet Crimes Against Children Task Forces and their partner agencies, technology modeled after the Canadian Child Exploitation Tracking System; and

(2) conduct training in the use of that technology.

(c) *Report*

Not later than July 1, 2007, the Attorney General, [ ] shall submit to Congress a report on the activities carried out under this section. The report shall include any recommendations that the Attorney General considers appropriate.

(d) *Authorization of appropriations*

There are authorized to be appropriated to the Attorney General, for fiscal year 2007 –

* * *

§ 16945. Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking

(a) *Establishment*

There is established within the Department of Justice, under the general authority of the Attorney General, an Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (hereinafter in this section referred to as the "SMART Office").

(b) *Director*

The SMART Office shall be headed by a Director who shall be appointed by the President. The Director shall report to the Attorney General through the Assistant Attorney General for the Office of Justice Programs and shall have final authority for all grants, cooperative agreements, and contracts awarded by

the SMART Office. The Director shall not engage in any employment other than that of serving as the Director, nor shall the Director hold any office in, or act in any capacity for, any organization, agency, or institution with which the Office makes any contract or other arrangement.

(c) *Duties and functions*

The SMART Office is authorized to –

(1) administer the standards for the sex offender registration and notification program set forth in this chapter;

(2) administer grant programs relating to sex offender registration and notification authorized by this chapter and other grant programs authorized by this chapter as directed by the Attorney General;

(3) cooperate with and provide technical assistance to States, units of local government, tribal governments, and other public and private entities involved in activities related to sex offender registration or notification or to other measures for the protection of children or other members of the public from sexual abuse or exploitation; and

(4) perform such other functions as the Attorney General may delegate.

* * *

PART C – ACCESS TO INFORMATION AND RESOURCES NEEDED TO ENSURE THAT CHILDREN ARE NOT ATTACKED OR ABUSED

§ 16961. Access to national crime information databases

(a) *In general*

Notwithstanding any other provision of law, the Attorney General shall ensure access to the national crime information databases (as defined in section 534 of title 28) by –

(1) the National Center for Missing and Exploited Children, to be used only within the scope of the Center's duties and responsibilities under Federal law to assist or support law enforcement agencies in administration of criminal justice functions; and

(2) governmental social service agencies with child protection responsibilities, to be used by such agencies only in investigating or responding to reports of child abuse, neglect, or exploitation.

(b) *Conditions of access*

The access provided under this section, and associated rules of dissemination, shall be –

(1) defined by the Attorney General; and

(2) limited to personnel of the Center or such agencies that have met all requirements set by the Attorney General, including training, certification, and background screening.

* * *

§ 16962. Schools Safe Act

(a) *Short title*

This section may be cited as the "Schools Safely Acquiring Faculty Excellence Act of 2006".

(b) *In general*

The Attorney General of the United States shall, upon request of the chief executive officer of a State, conduct fingerprint-based checks of the national crime information databases (as defined in section 534(f)(3)(A) of title 28) pursuant to a request submitted by –

* * *

(d) *Fees*

The Attorney General and the States may charge any applicable fees for the checks.

* * *

APPENDIX B

Interim Rule and Final Rule

* * *

PART 72 – SEX OFFENDER REGISTRATION AND NOTIFICATION [Interim Rule]

Sec.
72.1 Purpose.
72.2 Definitions.
72.3 Applicability of the Sex Offender Registration and Notification Act.

Authority: Pub. L. 109-248, 120 Stat. 587.

28 CFR § 72.1

§ 72.1 Purpose.

This part specifies the applicability of the requirements of the Sex Offender Registration and Notification Act to sex offenders convicted prior to the enactment of that Act. These requirements include registering and keeping the registration current in each jurisdiction in which a sex offender resides, is an employee, or is a student. The Attorney General has the authority to specify the applicability of the Act's requirements to sex offenders convicted prior to its enactment under sections 112(b) and 113(d) of the Act.

28 CFR § 72.2

§ 72.2 Definitions.

All terms used in this part that are defined in section 111 of the Sex Offender Registration and Notification Act (title 1 of Pub. L. 109-248) shall have the same definitions in this part.

28 CFR § 72.3

§ 72.3 Applicability of the Sex Offender Registration and Notification Act.

The requirements of the Sex Offender Registration and Notification Act apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act.

* * *

Example 2. A sex offender is convicted by a state jurisdiction in 1997 for molesting a child and is released following imprisonment in 2000. The sex offender initially registers as required, but disappears after a couple of years and does not register in any other jurisdiction. Following the enactment of the Sex Offender Registration and Notification Act, the sex offender is found to be living in another state and is arrested there. The sex offender has violated the requirement under the Sex Offender Registration and Notification Act to register in each state in which he resides, and could be held criminally liable under

18 U.S.C. 2250 for the violation because he traveled in interstate commerce.

* * *

PART 72 – SEX OFFENDER REGISTRATION AND NOTIFICATION [Final Rule]

1. The authority citation continues to read as follows:

Authority: Pub. L. 109-248, 120 Stat. 587.

28 CFR § 72.3

2. In § 72.3, Example 2 is revised to read as follows:

28 CFR § 72.3

§ 72.3 Applicability of the Sex Offender Registration and Notification Act.

*****

Example 2. A sex offender is convicted by a state jurisdiction in 1997 for molesting a child and is released following imprisonment in 2000. The sex offender initially registers as required but relocates to another state in 2009 and fails to register in the new state of residence. The sex offender has violated the requirement under the Sex Offender Registration and Notification Act to register in any jurisdiction in which he resides, and could be held criminally liable under 18 U.S.C. 2250 for the violation because he traveled in interstate commerce.

* * *

RESPONDENT'S BRIEF

No. 10-6549

In the Supreme Court of the United States

BILLY JOE REYNOLDS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner has standing to challenge a regulation issued by the Attorney General confirming that the requirements of the Sex Offender Registration and Notification Act, 42 U.S.C. 16901 *et seq.*, apply to all sex offenders, including those convicted of a qualifying sex offense before the statute's enactment.

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In the Supreme Court of the United States

No. 10-6549

BILLY JOE REYNOLDS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. 62-65) is not published in the *Federal Reporter* but is reprinted in 380 Fed. Appx. 125. The opinion of the district court (J.A. 20-23) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 2010. A petition for rehearing was denied on June 16, 2010 (J.A. 68-69). The petition for a writ of certiorari was filed on September 14, 2010, and was granted on January 24, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are set forth in an appendix to this brief. App., *infra*, 1a-21a.

STATEMENT

Following a conditional guilty plea in the United States District Court for the Western District of Pennsylvania, petitioner was convicted of failing to register and update his registration as a sex offender, in violation of 18 U.S.C. 2250(a). He was sentenced to 18 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. J.A. 13, 53-56, 62-65.

1. "Sex offenders are a serious threat in this Nation," in large part because "the victims of sexual assault are most often juveniles" and because "convicted sex offenders * * * are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *McKune* v. *Lile*, 536 U.S. 24, 32-33 (2002) (plurality opinion); see *Smith* v. *Doe*, 538 U.S. 84, 103 (2003) (noting "grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class"). As a result, Congress has frequently enacted legislation to encourage and assist States to keep track of sex offenders' addresses and to make information about sex offenders available to the public "for its own safety." *Id.* at 99.

In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (Wetterling Act), Pub. L. No. 103-322, § 170101, 108 Stat. 2038 (42 U.S.C. 14071). Among other things, the Wetterling Act encouraged States, as a condition of receiving federal funding, to adopt sex-

offender-registration laws meeting certain minimum standards. See *Smith*, 538 U.S. at 89-90. By 1996, every State and the District of Columbia had enacted a sex-offender-registration law. *Id.* at 90.

In 1996, Congress bolstered the minimum federal standards by adding a mandatory community notification provision to the Wetterling Act. See Megan's Law, Pub. L. No. 104-145, § 2, 110 Stat. 1345 (42 U.S.C. 14071(e)). Congress also strengthened the national effort to ensure the registration of sex offenders by directing the Federal Bureau of Investigation to create a national sex offender database, requiring lifetime registration for certain offenders, and making the failure of certain persons to register a federal crime, subject to a penalty of imprisonment of up to one year (in the case of a first offense) or ten years (in the case of a second or subsequent offense). See Pam Lychner Sexual Offender Tracking and Identification Act of 1996 (Lychner Act), Pub. L. No. 104-236, § 2, 110 Stat. 3093 (42 U.S.C. 14072).

Later statutes further enhanced federal registration and notification requirements. See, *e.g.*, Department of Justice Appropriations Act, 1998 (1998 Appropriations Act), Pub. L. No. 105-119, Tit. I, § 115(a), 111 Stat. 2461 (requiring, among other things, that sex offenders register in States in which they work or are students, in addition to States of residence); Campus Sex Crimes Prevention Act (CSCPA), Pub. L. No. 106-386, § 1601, 114 Stat. 1537 (requiring sex offenders to provide notice concerning institutions of higher education at which they work or are students); PROTECT Act, Pub. L. No. 108-21, §§ 604-605, 117 Stat. 688 (requiring States to make sex-offender-registry information available on the Internet).

Despite these legislative efforts, by 2005, Congress became concerned about "loopholes and deficiencies" in the various registration and notification statutes around the country. H.R. Rep. No. 218, 109th Cong., 1st Sess. Pt. 1, at 20 (2005) (*House Report*). One source of particularly grave concern was an estimate that as many as 100,000 sex offenders were "missing" or "lost," in the sense that their locations were unknown to both law enforcement and to residents of their communities. *Id.* at 26. The House Judiciary Committee described the problem of missing sex offenders as "[t]he most significant enforcement issue in the sex offender program." *Ibid.* The Committee concluded that "there is a strong public interest in finding" those missing sex offenders "and having them register with current information to mitigate the risks of additional crimes against children." *Id.* at 24.

On July 27, 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA), Pub. L. No. 109-248, Tit. I, 120 Stat. 590 (42 U.S.C. 16901 *et seq.*). SORNA was "generally designed to strengthen and increase the effectiveness of sex offender registration and notification for the protection of the public," and "to eliminate potential gaps and loopholes under the preexisting standards by means of which sex offenders could attempt to evade registration requirements or the consequences of registration violations." Office of the Att'y Gen., U.S. Dep't of Justice, *Applicability of the Sex Offender Registration and Notification Act*, 72 Fed. Reg. 8894, 8895 (2007); *Carr* v. *United States*, 130 S. Ct. 2229, 2232 (2010) (Congress enacted SORNA "[i]n an effort to make [existing] state schemes more comprehensive, uniform, and effective."). In furtherance of those ends, SORNA "establishe[d] a comprehensive na-

tional system for the registration of [sex] offenders." 42 U.S.C. 16901, and repealed the Wetterling Act and related provisions, effective roughly three years from the date of its enactment, SORNA § 129, 120 Stat. 600.[1]

SORNA requires that every "sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 42 U.S.C. 16913(a). A "sex offender," in turn, is defined as "an individual who was convicted of" an offense that falls within the statute's defined offenses. 42 U.S.C. 16911(1) and (5)-(7). SORNA provides that a sex offender "shall initially register" either "before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement" or, "if the sex offender is not sentenced to a term of imprisonment," "not later than 3 business days after being sentenced for that offense." 42 U.S.C. 16913(b). SORNA also provides that, "not later than 3 business days after each change of name, residence, employment, or student status," a sex offender "shall * * * appear in person in at least 1 jurisdiction involved pursuant to subsection (a) [*i.e.*, where the sex offender resides, is an employee, or is a student] and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry." 42 U.S.C. 16913(c). SORNA also

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[1] SORNA repealed those laws (42 U.S.C. 14071, 14072) effective the later of three years after SORNA's enactment or one year after certain software became available. SORNA § 129(b), 120 Stat. 601. SORNA required the described software to be available within two years of SORNA's enactment, see 42 U.S.C. 16923(c), and it became available two days short of that deadline, on July 25, 2008, see 42 U.S.C. 16924 note (Supp. III 2009). Thus, the repeal was effective three years after SORNA's enactment, on July 27, 2009.

specifies, among other things, the kinds of information that must be collected as part of registration (42 U.S.C. 16914), the length of time offenders must remain registered (42 U.S.C. 16915 (2006 & Supp. III 2009)), and the frequency with which a sex offender must appear in person and verify the registry information (42 U.S.C. 16916).

SORNA requires States to adopt the specified federal standards or risk losing federal funds. 42 U.S.C. 16912, 16925. States and other jurisdictions are given roughly three years, with the possibility of two one-year extensions, from the date of SORNA's enactment to "substantially implement" the Act's requirements. 42 U.S.C. 16924, 16925(a).[2]

Congress recognized that administrative guidance and rules would be necessary. Accordingly, SORNA broadly directs that "[t]he Attorney General shall issue guidelines and regulations to interpret and implement

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[2] Like repeal of the Wetterling Act and related provisions (note 1, *supra*), the initial grace period for jurisdictions to come into compliance is the later of three years after SORNA's enactment or one year after the date on which the relevant software became available. 42 U.S.C. 16924. Because of the software development timing discussed in note 1, each jurisdiction was initially required to implement SORNA three years after SORNA's enactment, on July 27, 2009. On May 26, 2009, the Attorney General (in conjunction with the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART Office)) granted a blanket one-year extension to and including July 27, 2010, to all jurisdictions. See SMART Office, U.S. Dep't of Justice, *Blanket Extension*, http://www.ojp.usdoj.gov/smart/smartwatch/09_august/blanketextension.html (last visited June 22, 2011). The SMART Office has subsequently issued an additional one-year extension to and including July 27, 2011, to nearly all jurisdictions. See SMART Office, U.S. Dep't of Justice, *SORNA Extensions Granted*, http://www.ojp.usdoj.gov/smart/pdfs/SORNA_Extensions_Granted.pdf (last visited June 22, 2011).

this subchapter." 42 U.S.C. 16912(b). In addition, SORNA authorizes the Attorney General to issue rules in certain specific contexts. As relevant here, Section 16913(d) provides:

> *Initial registration of sex offenders unable to comply with subsection (b)*
>
> The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).

42 U.S.C. 16913(d).

To enforce SORNA's registration requirements, Congress made noncompliance a federal crime in certain circumstances. Under 18 U.S.C. 2250(a), a convicted sex offender who "is required to register under [SORNA]," "travels in interstate or foreign commerce," and then "knowingly fails to register or update a registration as required by [SORNA]" may be punished by up to ten years of imprisonment. *Carr*, 130 S. Ct. at 2234-2235 (quoting 18 U.S.C. 2250(a)). The statute provides an affirmative defense if "uncontrollable circumstances" prevent compliance. 18 U.S.C. 2250(b).

2. In the months following SORNA's enactment, the Attorney General observed that "sex offenders with predicate convictions predating SORNA" were "attempting to devise arguments that SORNA is inapplicable to them, e.g., because a rule confirming SORNA's applicability has not been issued." 72 Fed. Reg. at 8896. To "foreclos[e] any dispute as to whether SORNA is

applicable where the conviction for the predicate sex offense occurred prior to the enactment of SORNA," the Attorney General issued a rule "making it indisputably clear that SORNA applies to all sex offenders (as the Act defines that term) regardless of when they were convicted." *Ibid.*

In the preamble to that rule, the Attorney General explained that, "[c]onsidered facially, SORNA requires all sex offenders who were convicted of sex offenses in its registration categories to register in relevant jurisdictions, with no exception for sex offenders whose convictions predate the enactment of SORNA." 72 Fed. Reg. at 8896. The Attorney General further stated that "SORNA's direct federal law registration requirements for sex offenders are not subject to any deferral of effectiveness. They took effect when SORNA was enacted on July 27, 2006, and currently apply to all offenders in the categories for which SORNA requires registration." *Id.* at 8895. The Attorney General reasoned that, "[i]f SORNA were deemed inapplicable to sex offenders convicted prior to its enactment, then the resulting system for registration of sex offenders would be far from 'comprehensive,' and would not be effective in protecting the public from sex offenders because most sex offenders who are being released into the community or are now at large would be outside of its scope for years to come." *Id.* at 8896. Accordingly, "to ensure the effective protection of the public from sex offenders through a comprehensive national system for the registration of such offenders" (*ibid.*), the Attorney General issued an interim rule confirming that "[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of [SORNA]." 28 C.F.R. 72.3.

The Attorney General made the interim rule effective immediately, invoking the "good cause" exceptions to the notice, comment, and publication requirements of the Administrative Procedure Act (APA), 5 U.S.C. 553. See 5 U.S.C. 553(b)(3)(B) and (d)(3) (good-cause exceptions); 72 Fed. Reg. at 8896-8897 (Attorney General's statement of good cause). The Attorney General explained that "[t]he immediate effectiveness of this rule is necessary" because postponing the rule's implementation could impede the effective registration of "virtually the entire existing sex offender population" and would thereby risk "the commission of additional sexual assaults and child sexual abuse or exploitation offenses * * * that could have been prevented had local authorities and the community been aware of the[] presence" of unregistered sex offenders. *Ibid.* The Attorney General concluded that this "would thwart the legislative objective of 'protect[ing] the public from sex offenders and offenders against children' by establishing 'a comprehensive national system for the registration of those offenders,'" *id.* at 8897 (brackets in original) (quoting 42 U.S.C. 16901), because "a substantial class of sex offenders could evade the Act's registration requirements and enforcement mechanisms during the pendency of a proposed rule and delay in the effectiveness of a final rule," *ibid.*

On December 29, 2010, the Federal Register published an Attorney General order finalizing the interim rule, with one clarifying change in an example to avoid any inconsistency with this Court's decision in *Carr*, *supra*. See Office of the Att'y Gen., U.S. Dep't of Justice, *Applicability of the Sex Offender Registration and*

Notification Act, 75 Fed. Reg. 81,849 (2010) (to be codified at 28 C.F.R. 72.3 (2011)).[3]

3. In 2001, petitioner was convicted in Missouri of statutory sodomy in the second degree. J.A. 13, 15; Presentence Investigation Report (PSR) ¶ 24. In 2005, petitioner was released from prison and, pursuant to Missouri law, registered as a sex offender in Missouri. J.A. 15. Petitioner updated and verified his registration information on several occasions. J.A. 15-19, 30. Each time, he signed sex offender forms notifying him of his duty to update his registration in Missouri and to register as a sex offender in any State to which he might move, and informing him that failure to comply is a criminal offense. *Ibid.*

In September 2007, while still on parole, petitioner moved to Pennsylvania without notifying his parole officer. PSR ¶¶ 6-7; J.A. 30-32, 52. He knowingly failed to update his registration in Missouri and to register in Pennsylvania when he arrived. J.A. 31-32, 40-41, 44-45.[4]

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[3] In the interim, the Attorney General (in coordination with the SMART Office) also promulgated guidelines for the States and other jurisdictions on matters of SORNA's implementation. See Office of the Att'y Gen., U.S. Dep't of Justice, *The National Guidelines for Sex Offender Registration and Notification*, 73 Fed. Reg. 38,030 (2008); see also Office of the Att'y Gen., U.S. Dep't of Justice, *Supplemental Guidelines for Sex Offender Registration and Notification*, 76 Fed. Reg. 1630 (2011). The guidelines were issued after notice and comment and they confirmed that SORNA applies to all sex offenders, including those convicted before SORNA's enactment or implementation in a particular jurisdiction. See 73 Fed. Reg. at 38,035-38,036, 38,046, 38,063.

[4] Petitioner suggests that he "agreed only that he did not register in Pennsylvania." Pet. Br. 15. But petitioner pleaded guilty to *knowingly* failing to register and update his registration. See J.A. 13, 29-30, 53.

In November 2007, a federal grand jury in the Western District of Pennsylvania returned an indictment charging petitioner with knowingly failing to register and update a registration as a sex offender, in violation of 18 U.S.C. 2250(a). J.A. 13-14. The indictment alleged that petitioner's interstate travel occurred between September 16, 2007, and October 16, 2007. J.A. 13. Petitioner moved to dismiss the indictment. J.A. 21-22. Among other things, petitioner argued that the Attorney General's interim rule was invalid under the APA because he did not have good cause to forgo notice, comment, and publication procedures. J.A. 22; Pet. C.A. App. 51-54. The district court denied the motion to dismiss. J.A. 20-23, and petitioner thereafter entered a conditional guilty plea reserving the right to appeal the denial of his motion. J.A. 24-38. The district court sentenced petitioner to 18 months of imprisonment, to be followed by three years of supervised release. J.A. 55-56.[5]

4. The court of appeals affirmed in an unpublished opinion. J.A. 62-65. After rejecting several of petitioner's claims on the merits, the court held that petitioner lacked standing to raise other arguments, including his claim that issuance of the Attorney General's interim rule violated the APA. J.A. 64. The court relied on its decision in *United States* v. *Shenandoah*, 595 F.3d

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[5] Petitioner began serving his term of supervised release in November 2009. See Petition on Supervised Release, *United States* v. *Reynolds*, No. 07-cr-412 (W.D. Pa. filed Dec. 10, 2010). In December 2010, petitioner's probation officer filed a petition in the district court stating that petitioner had moved to Arkansas and had been arrested there for again failing to register as a sex offender. See *ibid.*; J.A. 7. The district court issued a warrant for petitioner's arrest upon his release from state custody. J.A. 7.

151 (3d Cir.), cert. denied, 130 S. Ct. 3433 (2010), which was decided while this case was pending on appeal. The court explained that, in *Shenandoah*, it had held that SORNA's registration requirements apply of their own force, without the need for rulemaking by the Attorney General, to sex offenders like petitioner who had already initially registered with a State. J.A. 64; see *Shenandoah*, 595 F.3d at 163-164 (holding that "subsections (b) and (d) when read together seem to contemplate the need for clarification as to 'initial registrations' by persons convicted of qualifying sex offenses prior to July 27, 2006," but "[t]he allegations in this case clearly pertain to [the defendant's] failure to keep his registration current and, as such, are covered by 42 U.S.C. [] 16913(a) & (c)"). Because petitioner's registration duty under SORNA did not, therefore, depend on the Attorney General's interim rule, the court of appeals held that petitioner lacked standing to pursue his APA challenge. J.A. 64.

SUMMARY OF ARGUMENT

Petitioner's duty to register as a sex offender under SORNA arises directly from the statute itself. The validity of his conviction for failure to register and keep his registration current therefore does not depend on the validity of the Attorney General's rule confirming his registration requirements. The court of appeals correctly declined to reach that issue.

A. SORNA's registration provisions require all sex offenders to register and keep their registration current, including those convicted of a sex offense before SORNA's enactment or its implementation in a particular jurisdiction. The registration requirements are unqualified and do not distinguish between sex offenders

convicted before or after SORNA's enactment, or before or after its implementation in a particular jurisdiction. Rather, they apply to every "sex offender," a term defined as any "individual who *was* convicted of a sex offense." 42 U.S.C. 16911(1) (emphasis added). And those requirements became effective on the date of SORNA's enactment. Thus, as of July 27, 2006, any "individual who *was* convicted of a sex offense" (*ibid.* (emphasis added)) was required to, among other things, "register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student" (42 U.S.C. 16913(a)).

B. Subsection (d) of Section 16913 does not negate SORNA's express, unqualified registration requirements and it does not implicitly exempt any sex offenders from their reach. It confers discretionary authority on the Attorney General to modify or confirm the facially applicable registration requirements with respect to sex offenders convicted before SORNA's enactment or implementation in a particular jurisdiction—if needed. Absent regulatory action altering their scope, Subsection (a) and SORNA's other registration requirements fully apply to all sex offenders.

Petitioner's contention that the permissive delegation of regulatory authority to the Attorney General in Subsection (d) implicitly negates SORNA's registration requirements ignores the statutory structure and context, cannot be reconciled with the statutory purpose, and is not compelled by any express statutory text. First, a permissive grant of authority to the Attorney General to specify the applicability of SORNA's requirements to preenactment and preimplementation sex offenders is most naturally read as providing the Attorney

General with the flexibility to adjust those requirements in light of existing realities, and not as a wholesale exemption to the facially applicable and unqualified registration requirements set forth in the remainder of the Act. Second, the consequence of adopting petitioner's reading would be that SORNA's registration regime applied to nobody on the date of enactment and nobody for months and years into the future, unless and until the Attorney General said otherwise. It is simply not plausible to think that Congress would have intended any such blanket exemption for hundreds of thousands of registered sex offenders. Third, petitioner's anomalous interpretation cannot be reconciled with Congress's primary interest in locating and registering the approximately 100,000 "lost" sex offenders, all of whom were (by definition) preenactment offenders.

C. Although the courts of appeals have expressed different views on this issue, five courts of appeals agree that Subsection (d) does not exempt from SORNA's registration requirements all sex offenders convicted before SORNA's enactment or implementation in a particular jurisdiction. Those courts generally adopt a more circumscribed reading of the Attorney General's delegated authority under Subsection (d), but they all agree that it cannot be construed as both encompassing and exempting from SORNA's registration requirements all sex offenders convicted before SORNA's enactment.

D. The rule of lenity does not apply here. There is no "grievous ambiguity." The Act's text, along with its structure, context, and purpose, support the government's reading of Section 16913(d) as a grant of regulatory authority, not an open-ended exemption from SORNA's coverage that the Attorney General was left to fill.

ARGUMENT

PETITIONER'S FEDERAL DUTY TO REGISTER AS A SEX OFFENDER ARISES DIRECTLY FROM SORNA ITSELF

Petitioner seeks to challenge the Attorney General's interim rule confirming that preenactment sex offenders are required to register under SORNA. He does not dispute, however, that if SORNA's registration requirements applied to him of the statute's own force, the validity of the Attorney General's interim rule would be irrelevant to his criminal liability and he would have no stake in challenging it. Because petitioner's federal duty to register and update his registration as a sex offender in compliance with SORNA arises from the statute itself, petitioner would be required to register under SORNA regardless of the validity of the Attorney General's interim rule. The court of appeals therefore correctly declined to entertain his APA challenge to the Attorney General's rule and affirmed his conviction.[6]

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[6] The court of appeals stated that petitioner lacked "standing" to pursue his APA challenge. J.A. 64. Whether or not that statement meant to express a formal view on petitioner's Article III standing, cf. *Bond* v. *United States*, No. 09-1227 (June 16, 2011), slip. op. 4 (indicating that "Article III does not restrict [a criminal defendant's] ability to object to relief being sought at [his] expense"), the court's fundamental point remains sound. If petitioner's duty to register depends on SORNA itself, not on the validity of a later administrative rule, he has no personal stake in the validity of that rule and cannot obtain a judicial pronouncement on that issue. The court of appeals may have used the word "standing" in that more colloquial sense.

A. SORNA's Registration Requirements Are Unqualified And Directly Apply To Every Sex Offender, Including Those With Preenactment Sex Offense Convictions

To determine whether a sex offender is required to register under SORNA, the analysis must begin with the statutory provisions that set forth SORNA's registration obligations.

Section 16913(a) of Title 42 sets forth registration requirements applicable to all sex offenders: "A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 42 U.S.C. 16913(a); see *ibid.* ("For initial registration purposes only, a sex offender shall also register" in the jurisdiction of conviction if "different from the jurisdiction of residence."). Subsection (b) provides that a "sex offender shall initially register" either "before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement" or, "if the sex offender is not sentenced to a term of imprisonment," "not later than 3 business days after being sentenced for that offense." 42 U.S.C. 16913(b). And Subsection (c) states that "[a] sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved" and inform that jurisdiction of the relevant changes. 42 U.S.C. 16913(c); see also 42 U.S.C. 16914(a) (information a "sex offender" must provide); 42 U.S.C. 16915 (2006 & Supp. III 2009) (registration period applicable to different "sex offender" tiers); 42 U.S.C. 16916 ("sex offender" must appear in person at periodic intervals to verify registration information). These requirements are clear and unqualified; they do not distinguish be-

tween sex offenders convicted before or after SORNA's enactment, nor do they distinguish between offenders convicted before or after a jurisdiction's implementation of the Act.

To the contrary, SORNA's registration requirements expressly apply to every "sex offender." And that term is defined to include any "individual who *was* convicted of a sex offense." 42 U.S.C. 16911(1) (emphasis added); see 42 U.S.C. 16911(5)(B) ("A foreign conviction is not a sex offense for purposes of this subchapter if it *was* not obtained with sufficient safeguards.") (emphasis added). This Court has "frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach." *Carr* v. *United States*, 130 S. Ct. 2229, 2236 (2010); see *United States* v. *Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes."). And, as this Court recognized in *Carr*, Congress's use of the past tense ("was") in defining the type of sex offender required to register evidences an intent to cover preenactment convictions. 130 S. Ct. at 2237 n.6. SORNA's registration requirements therefore facially apply to all "sex offenders," *i.e.*, every individual who "was convicted" of a qualifying sex offense.[7]

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[7] SORNA's predecessor bills in both the House and the Senate similarly used language intended to encompass preenactment convictions. See H.R. 4472, 109th Cong., 2nd Sess. § 111(3) (as passed by House Mar. 8, 2006) ("'sex offender' means an individual who, either before or after the enactment of this Act, was convicted of, or adjudicated as a juvenile delinquent for, a sex offense"); S. 1086, 109th Cong., 2d Sess. § 102(1) (as passed by Senate May 4, 2006) ("'covered individual' means any adult or juvenile * * * who," *inter alia*, "has been convicted of a covered offense against a minor" or "who has been convicted of a sexually violent offense"); cf. *Carr*, 130 S. Ct. at 2237 (citing "numerous federal statutes [that] use the past-perfect tense to describe one or more elements of a criminal offense when coverage of preenactment

The federal directive to those sex offenders went into effect on the date of SORNA's enactment, July 27, 2006. "It is well established that, absent a clear direction from Congress to the contrary, a law takes effect on the date of its enactment." *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 404 (1991). Section 16913 contains no provision specifying its effective date; nor is there a specified effective date for SORNA as a whole. This stands in contrast to other provisions of the Act. For example, Congress provided that Section 129 of SORNA (which repeals the Wetterling Act and related provisions) "shall take effect on the date of the deadline determined in accordance with [42 U.S.C. 16924(a)]," roughly three years from the date of SORNA's enactment. SORNA § 129(b), 120 Stat. 601; see *id.* § 152(c)(1), 120 Stat. 609 ("The amendments made by subsection (a) shall take effect on October 1, 2006."); *id.* § 152(c)(2), 120 Stat. 609 ("The amendments made by subsection (b) shall take effect on October 1, 2008."). Congress's silence here also contrasts with prior federal sex offender registration and notification laws, several of which had expressly announced a delayed effective date. See, *e.g.*, CSCPA § 1601(b)(2), 114 Stat. 1537 (amendment "shall take effect 2 years after the date of the enactment of this Act"); 1998 Appropriations Act § 115(c)(1), 111 Stat. 2467 (providing that certain provisions would take effect one year after enactment); Lychner Act § 10(a), 110 Stat. 3098 ("This Act and the amendments made by this Act shall

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events is intended"). In contrast, the registration requirements under the Wetterling Act generally applied to "a person who *is* convicted of a criminal offense against a victim who is a minor or who *is* convicted of a sexually violent offense." 42 U.S.C. 14071(a)(1)(A) (emphases added).

become effective 1 year after the date of enactment of this Act.").[8]

Accordingly, as of July 27, 2006, any "individual who *was* convicted of a sex offense" (42 U.S.C. 16911(1) (emphasis added)) was required to, among other things, "register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student" (42 U.S.C. 16913(a)).

B. SORNA's Permissive Delegation Of Authority To The Attorney General To Specify The Applicability Of SORNA's Requirements To Preenactment And Preimplementation Sex Offenders Does Not Implicitly Exempt Those Sex Offenders From SORNA's Registration Requirements

Petitioner does not dispute that Subsection (a) of Section 16913 provides that every individual who was convicted of a qualifying sex offense must register and keep his registration current. Instead, petitioner argues that Subsection (d) implicitly negated that registration requirement and all others, exempting every sex offender convicted before SORNA's enactment or imple-

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[8] Petitioner does not explicitly dispute that the registration requirements became "effective" on the date of SORNA's enactment, but the logical consequence of his argument is that they did not have any effect on that date. That is because petitioner contends that 42 U.S.C. 16913(d) is a "clear direction" (Pet. Br. 37 n.19) that preenactment and preimplementation offenders are exempted from the registration and updating requirements absent Attorney General action. But preenactment and preimplementation offenders constituted *all* sex offenders on SORNA's effective date. See pp. 28-29, *infra*. The upshot of his position, therefore, is that, although SORNA's registration provisions became immediately "effective" upon enactment, they did not apply to anyone at that time.

mentation in a particular jurisdiction. Subsection (d) provides that:

> The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).

42 U.S.C. 16913(d). Resting entirely on the first clause of that provision, petitioner contends that Congress carved out from SORNA's registration requirements all existing sex offenders (preenactment offenders) and all new sex offenders for many months and years into the future (preimplementation offenders)—unless and until the Attorney General were to declare otherwise. That reading ignores the statutory structure and context, is fundamentally inconsistent with the statutory purpose, and is not compelled by the express statutory text.

Subsection (d) does not negate the broad scope of SORNA's express, unqualified registration requirements and it does not implicitly exempt any sex offenders from their reach. It confers discretionary authority on the Attorney General to modify or confirm the facially applicable registration requirements with respect to sex offenders convicted before SORNA's enactment or implementation in a particular jurisdiction, if and to the extent the Attorney General determines that such specification is needed at some point in the future. Thus, Subsection (a) and SORNA's other registration requirements fully apply to all sex offenders, unless and

until the Attorney General exercises his authority under Subsection (d) to declare otherwise.

1. Subsection (d)'s text does not exempt any sex offenders from SORNA's registration requirements

The structure of Section 16913(d) is straightforward. It contains two clauses each of which makes a distinct grant of authority. The first clause grants the Attorney General "authority" "to specify the applicability" of SORNA's requirements to two groups of sex offenders: (1) those convicted before SORNA's enactment, and (2) those convicted before SORNA's implementation in a particular jurisdiction. The second clause grants the Attorney General "authority" "to prescribe" registration rules for those sex offenders and for other sex offenders who are unable to comply with the initial registration requirements set forth in Subsection (b). Read naturally, therefore, the first clause of Subsection (d) delegates to the Attorney General the authority to "specify" whether or not SORNA's registration requirements apply to sex offenders convicted before SORNA's enactment or implementation in a particular jurisdiction.

Petitioner relies on the same interpretation to argue that preenactment and preimplementation sex offenders are therefore "necessarily" (Pet. Br. 25 n.12; see *id.* at 18) exempt from SORNA's registration requirements unless and until the Attorney General "specif[ies]" that those requirements apply. That does not linguistically or logically follow.

As petitioner's reliance on negative implications reveals (Pet. Br. 25 n.12, 29), his interpretation is not based on what 42 U.S.C. 16913(d) actually says. Subsection (d) does not carve out a class of sex offenders from the otherwise mandatory and unqualified registration

requirements imposed directly on all sex offenders in Subsections (a)-(c), as well as in other provisions of SORNA. Subsections (a), (b), and the first sentence of (c) are federal requirements imposed directly on sex offenders; Subsection (d) is a permissive delegation of authority to the Attorney General.[9] And, unlike with other provisions of SORNA, Congress did not draft Subsection (d) as an exception to, or a qualification of, those other subsections. Cf. 42 U.S.C. 16915(b)(1) ("[t]he full registration period" set forth in Subsection (a) "shall be reduced as described in paragraph (3)"); 42 U.S.C. 16918(a) ("[e]xcept as provided in this section, each jurisdiction shall make" certain information available on the Internet); 42 U.S.C. 16921(b) ("[e]xcept as provided in subsection (c)," an appropriate official shall provide registry information to certain people); 42 U.S.C. 16921(c) ("[n]otwithstanding subsection (b)," certain people can choose to receive registry information on a different schedule).

Section 16913(d) is not even a directive to the Attorney General. Congress did not provide that the Attorney General *shall* "specify the applicability" of SORNA's

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[9] Petitioner's reliance (Pet. Br. 37 n.19) on the rule of statutory construction that a more specific provision controls over a general provision is therefore misplaced. Unlike Subsections (a), (b), and the first sentence of (c), as well as several other SORNA provisions (see p. 16, *supra*), Subsection (d) is not directed at sex offenders and it therefore does not prescribe any sex offender's registration requirements—whether the offender was convicted before SORNA's enactment, or implementation, or otherwise. Cf. *Corley* v. *United States*, 129 S. Ct. 1558, 1568 (2009) (resolving conflict between different subsections where earlier subsection was a "broad directive" addressing the admissibility of voluntary confessions and later subsection was directed specifically at voluntary confessions obtained after a time delay in presentment to a magistrate).

requirements to sex offenders convicted before SORNA's enactment or its implementation in a particular jurisdiction. It stated instead that the Attorney General "shall have the authority" to do so.[10] As the First Circuit explained, Congress "eschewed the use of mandatory language (e.g., 'shall determine') that would have compelled the Attorney General to make an affirmative determination before the statute could be applied to any previously convicted sex offender." *United States* v. *DiTomasso*, 621 F.3d 17, 25 (2010), petition for cert. pending, No. 10-8532 (filed Jan. 19, 2011).

Subsection (d) does not require the Attorney General to act within a certain time frame or by a date certain; it does not require him to act at all. See *United States* v. *Fuller*, 627 F.3d 499, 505 (2d Cir. 2010) ("[W]hatever authority it grants, it does not require that it be exercised."), petition for cert. pending, No. 10-10721 (filed May 24, 2011). Congress's grant of permissive authority to the Attorney General in Subsection (d) stands in notable contrast to the many other provisions of SORNA that mandate action by the Attorney General. Compare 42 U.S.C. 16913(d) ("shall have the authority"), with 42 U.S.C. 16912(b) ("The Attorney General shall issue guidelines and regulations to interpret and implement this subchapter."), 42 U.S.C. 16917(b) ("The Attorney General shall prescribe rules for the notification of [cer-

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[10] The first court of appeals to hold that SORNA's registration requirements are not applicable to sex offenders convicted before its enactment, unless and until the Attorney General says otherwise, misread Subsection (d) as imposing a mandatory duty on the Attorney General. See *United States* v. *Madera*, 528 F.3d 852, 857 (11th Cir. 2008) (per curiam) (reasoning from proposition that use of the "word 'shall' indicates that Congress was issuing a directive to the Attorney General specifically to make the determination").

tain] sex offenders."), 42 U.S.C. 16919(a) ("The Attorney General shall maintain a national database."), 42 U.S.C. 16919(b) ("The Attorney General shall ensure * * * that updated information about a sex offender is immediately transmitted."), 42 U.S.C. 16923(a) ("The Attorney General shall, in consultation with the jurisdictions, develop and support software."), 42 U.S.C. 16926(a) ("The Attorney General shall establish and implement a Sex Offender Management Assistance program."), and 42 U.S.C. 16942(a) ("[T]he Attorney General shall create and maintain a Project Safe Childhood program."); see also 42 U.S.C. 16920(a), 16921(b)(1), 16925(a) and (b), 16941(a), 16943; *DiTomasso*, 621 F.3d at 25 ("Congress's decision to couch some provisions of the statute in mandatory language but to couch subsection (d) in discretionary language is a telltale sign.").[11]

Under his delegated authority in Subsection (d), the Attorney General could reaffirm the statutory requirement that every sex offender convicted before SORNA's enactment or its implementation in a particular jurisdiction register; he could require some but not all to register (or comply with some but not all of the registration requirements); he could do nothing at all or wait several years before acting; or he could change his mind at any given time or over the course of different administrations. See *United States* v. *Hinckley*, 550 F.3d 926, 948 (10th Cir. 2008) (Gorsuch, J., concurring), cert. denied,

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[11] Subsection (d) also stands apart from provisions of the Act that require action by the Attorney General within a specified time frame. *E.g.*, 42 U.S.C. 16923(c) (two-year deadline for creating certain software); 42 U.S.C. 16942(a) (six-month deadline for creating a Project Safe Childhood program); 42 U.S.C. 16944(c) (deadline of approximately 11 months to submit a report on training and technology efforts).

129 S. Ct. 2383 (2009). A permissive grant of authority to the Attorney General to act—if he so chooses, at any given point in time—to specify the applicability of SORNA's requirements to preenactment and preimplementation sex offenders is most naturally read as a grant of authority to adjust the registration requirements if necessary, and not as an affirmative declaration that those sex offenders are exempt from the facially applicable and unqualified registration requirements set forth in the remainder of the Act. See *DiTomasso*, 621 F.3d at 30 (Boudin, J., concurring) (whatever the scope of Subsection (d)'s delegation of authority, "it still does *not* say that SORNA exempts those convicted before SORNA unless and until the Attorney General so determines").

Nothing about the phrase "specify the applicability" compels a different result. See *DiTomasso*, 621 F.3d at 30 n.10 (Boudin, J., concurring) ("'authority to specify' says nothing express about whether subsection (a) operates with full force if the Attorney General declines to exercise his authority"). Petitioner asks this Court to read "specify the applicability" as "determine [] in the first instance." Pet. Br. 25. But, as discussed above (pp. 16-19, *supra*), the other SORNA provisions make clear that "Congress itself had already made the [initial] determination that SORNA applie[s] to all sex offenders regardless of when convicted." *Fuller*, 627 F.3d at 506. The Attorney General's permissive authority to "specify the applicability" of those requirements operates in light of that statutory backdrop. That is, there already are registration requirements that apply to sex offenders convicted before SORNA's enactment (or implementation), and those requirements might require some modification or clarification in the future.

2. Reading Subsection (d) as permissive authority to regulate, not as a carve out from unqualified duties imposed on individuals, is consistent with SORNA's structure, context, and purpose

"[T]o protect the public from sex offenders and offenders against children," Congress "establishe[d] a comprehensive national system for the registration of those offenders," 42 U.S.C. 16901, that directly imposes registration requirements on all "sex offenders," 42 U.S.C. 16913(a). As petitioner recognizes (Pet. Br. 39-41), putting that comprehensive regime into place could be expected to give rise to difficulties in implementation, some of which could implicate sex offenders convicted before SORNA's enactment or its implementation in a particular jurisdiction. States, for example, might be disinclined to spend their resources tracking down sex offenders convicted many years earlier who are not currently registered and have since entered the general population. *E.g.*, 73 Fed. Reg. at 38,030, 38,046; 76 Fed. Reg. at 1635-1636. Strong resistance by jurisdictions could, in turn, delay or defeat the effectiveness of the comprehensive regime envisioned by Congress. What those difficulties might be, whether they would in fact arise, and what adjustments would best address such concerns while still furthering the statutory objectives, would only become apparent through subsequent experience in implementation.

That is where Subsection (d) comes into play. Congress armed the Attorney General with the discretionary authority to "specify the applicability" of SORNA's registration requirements to preenactment and preimplementation offenders, so that he could resolve any such issues about SORNA's applicability that might arise. This delegation of authority reflects "Congress's recog-

nition that specific applications of the registration requirements to previously convicted sex offenders may have unintended consequences." *DiTomasso*, 621 F.3d at 23, and that "problematic permutations * * * might arise with respect to some previously convicted sex offenders," *id.* at 25. See *id.* at 30 (Boudin, J., concurring) (Subsection (d) permits "the Attorney General to qualify the blanket applicability of subsection (a) itself if special problems arose in applying the statute to pre-SORNA convicts."); *Fuller*, 627 F.3d at 506 (Subsection (d) gives the Attorney General "authority to work out the complications that may arise in the application of a new federal criminal law to an already existent class of offenders, the myriad permutations of which Congress chose not to address in the Act itself, in order to ensure an efficient and 'comprehensive' national sex offender registration system."). Subsection (d) is thus best read as "allow[ing]—but * * * not compel[ling]—the Attorney General to narrow SORNA's sweep if and to the extent that he concludes that specific situations invite such narrowing." *DiTomasso*, 621 F.3d at 23; cf. *Corley v. United States*, 129 S. Ct. 1558, 1566 (2009) (rejecting broadly applicable language in one statutory subsection where such a reading would render another subsection "nonsensical and superfluous").[12]

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[12] The Attorney General has not yet exercised his authority under the first clause of Subsection (d) to exempt from the federal registration requirements any sex offender convicted before SORNA's enactment or implementation in a particular jurisdiction. Difficulties in implementation with respect to such offenders have arisen, but the Attorney General has exercised his discretion to address those issues through other means. For example, the Attorney General, in conjunction with the SMART Office, issued guidelines providing that a jurisdiction will be deemed to have substantially implemented SORNA if it registers preenactment and preimplementation sex offenders who remain in the

3. Petitioner's interpretation cannot be squared with the statutory structure and context

Petitioner's interpretation cannot be squared with the statutory structure and context. See *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").

a. To understand why that is so, it is important to explain three crucial aspects of the statutory scheme:

First, Subsection (d) refers to sex offenders convicted before SORNA's "implementation in a particular jurisdiction," in addition to sex offenders convicted before SORNA's enactment. 42 U.S.C. 16913(d).[13] SORNA does not direct States to implement its requirements; it encourages them to do so by conditioning the receipt of certain federal funds on substantial implementation of the Act. 42 U.S.C. 16912(a), 16924, 16925(a) and (d). States may therefore choose to forgo federal

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system as prisoners, supervisees, or registrants, or who reenter the system because of a subsequent felony conviction. See 73 Fed. Reg. at 38,046, 38,063-38,064; 76 Fed. Reg. at 1635-1636. The Attorney General promulgated those guidelines under his authority to interpret and implement SORNA (42 U.S.C. 16912(b)), to determine whether jurisdictions have substantially implemented the Act (42 U.S.C. 16925), and to prescribe rules governing jurisdictions' initial registration of preenactment and preimplementation sex offenders and other offenders who cannot be registered within the normal time frame in Subsection (b) (second clause of 42 U.S.C. 16913(d)).

[13] Petitioner asserts (Pet. Br. 24 n.11) that the Attorney General's interim rule addresses only the applicability of SORNA's requirements to preenactment sex offenders. That issue is not before the Court, but it is also not true. The interim rule expressly states that SORNA applies "to *all* sex offenders." 28 C.F.R. 72.3 (emphasis added); see 73 Fed. Reg. at 38,046, 38,063.

funding rather than comply. Congress also gave jurisdictions roughly three years to implement SORNA's requirements, with a possibility of two one-year extensions if authorized by the Attorney General. 42 U.S.C. 16924; see note 2, *supra*. At the end of the initial three-year grace period, no State (or other jurisdiction) had substantially implemented SORNA. See Office of Justice Programs, U.S. Dep't of Justice, *Justice Department Announces First Two Jurisdictions to Implement Sex Offender Registration and Notification Act* (Sept. 23, 2009), http://www.ojp.usdoj.gov/newsroom/pressreleases/2009/SMART09154.htm. And, as of the filing of this brief, nearly five years after SORNA's enactment, only seven States (and four other jurisdictions) have substantially implemented. See Office of Justice Programs, U.S. Dep't of Justice, *Justice Department Announces Four More Jurisdictions Implement Sex Offender Registration And Notification Act* (May 12, 2011), http://www.ojp.usdoj.gov/newsroom/pressreleases/2011/SMART11102.htm. Accordingly, the "special subset[] of sex offenders" (Pet. Br. 21) referred to in the first clause of Subsection (d) in fact encompasses (i) all existing sex offenders on the day of SORNA's enactment (preenactment offenders), and (ii) the vast majority of sex offenders convicted in the ensuing months and years after SORNA's enactment, who live, work, or go to school in jurisdictions that did not implement SORNA before their predicate sex offense convictions (preimplementation offenders).

Second, and relatedly, Section 16913 does more than impose federal obligations on sex offenders; it sets forth some of the many SORNA requirements that jurisdictions must "substantially implement" in order to receive certain federal funds. See 42 U.S.C. 16912(a) (requiring

"[e]ach jurisdiction" to "maintain a jurisdiction-wide sex offender registry conforming to the requirements of this subchapter"); 42 U.S.C. 16925(a) (requiring each jurisdiction to "substantially implement this subchapter" or risk losing certain federal funds). Thus if, for example, Section 16913(d) is read as exempting all sex offenders convicted before SORNA's enactment or implementation in a particular jurisdiction from its registration requirements, then no State would be obligated under SORNA (as a condition of federal funding) to register such offenders as part of the State's registration and notification program.

Third, many sex offenders convicted before the enactment of SORNA (and before its implementation in any given jurisdiction) were already required to and had, in fact, registered as sex offenders under preexisting law. (By Congress's estimation, there were at that time more than 500,000 registered sex offenders. See *Fuller*, 627 F.3d at 505.) SORNA overhauled the preexisting federal regime and, in furtherance of that effort, it repealed the Wetterling Act and related provisions, effective July 27, 2009. See note 1, *supra*. Accordingly, as of July 27, 2009, SORNA was the *only* federal registration requirement that could have applied to the approximately 500,000 already registered sex offenders. And because, as noted above, the States are only required to implement SORNA's requirements (to receive federal funds), if SORNA itself imposes *no* requirements on preenactment and preimplementation offenders, States would have no funding incentive to register such offenders at all.

b. Petitioner's reading of Subsection (d)'s first clause is implausible in light of this statutory design. Petitioner effectively argues that, with one hand, Con-

gress enacted a "comprehensive national system" (42 U.S.C. 16901) for the registration of all sex offenders (42 U.S.C. 16911(1), 16913(a)) and, with the other, it exempted from that system all existing sex offenders, and the vast majority of new sex offenders for months and years into the future. See *Hinckley*, 550 F.3d at 945 (Gorsuch, J., concurring). Given that the delegation of authority in Subsection (d) is permissive, petitioner's interpretation would further suggest that Congress was indifferent about whether or when that comprehensive national system would ever include those sex offenders. See *DiTomasso*, 621 F.3d at 30 (Boudin, J., concurring) (such a reading "suppose[s] that Congress left those with pre-SORNA convictions free from registration requirements unless and until the Attorney General got around to regulating"); *Hinckley*, 550 F.3d at 945 n.3 (Gorsuch, J., concurring) (Such a reading would mean that SORNA's registration requirements "presumptively appl[y] *only to future sex offenders*. It is merely if the Attorney General happens to choose, in his or her unfettered discretion and at some unspecified future time or in some future age, to rule otherwise that the Act has any application to existing sex offenders."). Thus, in petitioner's view, an individual convicted of a qualifying sex offense in May 2006 and sentenced to ten years of imprisonment would not have a federal statutory duty to register as a sex offender upon release; nor would an individual who was convicted of a sex offense in 2004, and who registered in compliance with preexisting law, have a federal statutory obligation to keep the registration current upon moving to another State in 2009. See *id.* at 944 (Gorsuch, J., concurring).

It is no answer to say that, today, those sex offenders are required to register because the Attorney General

has exercised his authority under the first clause of Subsection (d) to confirm that SORNA's requirements mean what they say, *i.e.*, they apply to all sex offenders. See 28 C.F.R. 72.3; 72 Fed. Reg. at 8894-8896; 75 Fed. Reg. at 81,849-81,852; see also 73 Fed. Reg. at 38,035-38,036; cf. note 21, *infra*. The question is what Congress intended when it set up a "comprehensive national system" that became effective on July 27, 2006. And looking at the statutory scheme on the day of enactment, it is unreasonable to think that Congress overhauled federal registration law to create a new regime that would apply to *no* existing sex offenders, and *no* new sex offenders for many months and years to come, unless and until the Attorney General chose to exercise his discretionary authority to act at some undefined point in the future. See *Fuller*, 627 F.3d at 505 ("[W]e do not think Congress was so agnostic as to whether the half million sex offenders convicted before SORNA's enactment were required to comply with SORNA's registration requirements.").[14]

c. Even if petitioner's interpretation could be justified if dictated by the express statutory text, but cf. *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) ("[I]n rare cases the literal application of a statute will produce a result demonstrably at odds with the

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[14] Petitioner suggests (Pet. Br. 40-41) that political forces would necessarily prompt the Attorney General to apply SORNA's registration requirements to preenactment sex offenders. But, in petitioner's view, those political forces were not strong enough to prompt *Congress* to require those sex offenders to register. And if petitioner's argument is that the Attorney General's exercise of his delegated authority would obviously lead him to apply SORNA to those offenders, it is difficult to understand why Congress would have enacted a provision that did nothing more than delay the Act's effectiveness for the entire existing sex offender population.

intentions of its drafters, and those intentions must be controlling."), that is not the case here. Petitioner asks this Court to reach that anomalous result by drawing a negative implication from a three-word phrase ("specify the applicability") contained in one clause of a subsection that delegates permissive authority to the Attorney General. Cf. *Wal-Mart Stores, Inc.* v. *Dukes*, No. 10-277 (June 20, 2011), slip op. 23-24 ("[A] mere negative inference does not in our view suffice to establish a disposition that has no basis in the Rule's text, and that does obvious violence to the Rule's structural features."); *Corley*, 129 S. Ct. at 1573 (Alito, J., dissenting) (broadly applicable provision should control where the only "conflict" is "between the express language of one provision * * * and the 'negative implication' * * * from another"). Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman* v. *American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). Here, it would be "passing strange" for Congress to "grant the Attorney General sole authority to determine SORNA's criminal reach by cabining this expansive and profound power in a single independent clause preceding an unrelated, highly specific, and purely administrative grant of authority, located under an inapposite heading in the fourth subsection of a subchapter of the statute." *Fuller*, 627 F.3d at 505.

4. Petitioner's interpretation is fundamentally inconsistent with SORNA's broader purpose

Petitioner's interpretation is also impossible to square with SORNA's broader purpose. See *Crandon* v. *United States*, 494 U.S. 152, 158 (1990) ("In determining the meaning of the statute, we look not only to the par-

ticular statutory language, but to * * * its object and policy.").

a. As discussed above (see pp. 2-3, *supra*), Congress enacted multiple laws in the dozen years before SORNA that were intended to provide for sex-offender registration and community notification. Despite these many laws, by 2005, Congress perceived a need to strengthen the effectiveness of sex offender registration and notification programs; to eliminate potential gaps and loopholes under the then-current laws; and to create a comprehensive national system such that both law enforcement and the public would be aware of sex offenders living in their communities. See p. 4, *supra*; 72 Fed. Reg. at 8895; *House Report* 181 ("The accuracy and completeness of the sexual offender registry system is vitally important to our national efforts to fight crimes against kids. It is essential.") (statement of Rep. Green).

More specifically, one of Congress's primary concerns was that an estimated 100,000 sex offenders in the United States were "missing" or "lost," *i.e.*, their locations were "unknown to the public and law enforcement." 152 Cong. Rec. 15,713 (2006) (statement of Rep. Sensenbrenner). The House Judiciary Committee stressed the problem of these "missing" sex offenders and made clear that SORNA was designed to help locate them: "The combination of incentives for the sex offender to comply, enhanced criminal penalties, and additional law enforcement resources to focus on this problem will reduce the overwhelming number of noncomplying or 'lost' sex offenders in our communities." *House Report* 26; see *id.* at 24 (new legislation would address the "strong public interest" in finding the 100,000 "lost" sex offenders and "having them register

with current information to mitigate the risks of additional crimes against children"); 152 Cong. Rec. at 15,331 (statement of Sen. Allen) ("[T]here are more than 550,000 registered sex offenders in the United States, and there are an estimated 100,000 sex offenders who are missing from the system. Loopholes in this current system have allowed some sexual predators to evade law enforcement and place our children at risk. That is why the national registry aspect of this bill is so important."); *id.* at 15,338 (statement of Sen. Kyl) ("There currently are over 100,000 sex offenders in this country who are required to register but are 'off the system.' They are not registered. The penalties in this bill should be adequate to ensure that these individuals register."); *id.* at 13,050 (statement of Sen. Frist) ("There are currently 550,000 registered sex offenders in the U.S. and at least 100,000 of them are missing from the system. Every day that we don't have this national sex offender registry, these missing sex predators are out there somewhere."). In light of the pressing public interest in registering "lost" sex offenders, it would be strange indeed for Congress to have enacted a statutory scheme that exempted those very offenders from the Act's registration requirements.

b. Petitioner does not dispute this purpose. But he is unable to reconcile his position with it.

Petitioner first argues that, in *Carr*, this Court found "[s]uch 'vague notions of a statute's "basic purpose" * * * inadequate to overcome the words of its text regarding the specific issue under consideration.'" Pet. Br. 40 n.21 (quoting *Carr*, 130 S. Ct. at 2241); *id.* at 41. But *Carr* involved the interstate travel element contained in the criminal sanction provision, 18 U.S.C. 2250; this case calls for an interpretation of the registration

requirements at the very core of SORNA's "broader statutory scheme." See *Carr*, 130 S. Ct. at 2240 (distinguishing between "the specific purpose of [Section] 2250" and the "broader statutory scheme"). In *Carr*, the Court recognized that these broader provisions, including 42 U.S.C. 16913(a), "stand at the center of Congress' effort to account for missing sex offenders." 130 S. Ct. at 2240-2241. And the statute's broad purpose is entirely consistent with the statutory text at issue here. See pp. 16-25, *supra*.

Petitioner next asserts (Pet. Br. 40-42, 46-47) that reading SORNA as imposing an immediate duty on preenactment sex offenders to provide current registration information would risk defeating Congress's objectives by rendering SORNA "ineffective as to these offenders" (*id.* at 40). To the extent that petitioner suggests SORNA would be "ineffective" because complications could arise with respect to the registration of preenactment and preimplementation offenders, petitioner misunderstands the statutory scheme.

To comply with SORNA's registration requirements, a sex offender must register and keep his registration current in any jurisdiction where he lives, works, or goes to school. 42 U.S.C. 16913(a). All 50 States and the District of Columbia had sex-offender registries in place for years before SORNA's enactment. *Smith* v. *Doe*, 538 U.S. 84, 90 (2003). SORNA requires sex offenders to use those preexisting registries. See 42 U.S.C. 16911(9) ("The term 'sex offender registry' means a registry of sex offenders, and a notification program, maintained by a jurisdiction."). If a State declines to implement SORNA's requirements and forgoes a portion of federal criminal justice funding, that would have no impact on a sex offender's obligation to register and update his reg-

istration in compliance with SORNA. Cf. *Kennedy* v. *Allera*, 612 F.3d 261, 268 (4th Cir.) ("Maryland law creates a sex offender registry in which [the defendant] can register even if we were to assume, for purposes of argument, that Maryland law does not of its own force require him to register."), cert. denied, 131 S. Ct. 554 (2010). And SORNA accounts for the possibility that a State could decline a particular sex offender's attempt to register by providing an affirmative defense to criminal prosecution for any person who was prevented from complying by circumstances beyond his control. 18 U.S.C. 2250(b); see *Kennedy*, 612 F.3d at 269 ("[T]he criminal provisions of SORNA also recognize that a State can refuse registration inasmuch as they allow, as an affirmative defense to prosecution, the claim that 'uncontrollable circumstances prevented the individual from complying.'"). Thus, any suggestion that preenactment or preimplementation sex offenders would face widespread difficulties in complying with their SORNA registration duties lacks merit.[15]

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[15] As petitioner notes (Pet. Br. 34-35), Subsection (b) sets forth a particular time frame by which a sex offender must initially register: "before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement" or, "if the sex offender is not sentenced to a term of imprisonment," "not later than 3 business days after being sentenced for that offense." 42 U.S.C. 16913(b). Some unregistered sex offenders convicted before SORNA's enactment will not be able to comply with this time frame, because they were released from prison for the predicate sex offense before SORNA's enactment or because they received a nonincarcerative sentence for the predicate sex offense more than three business days before SORNA's enactment. Recognizing this, Congress expressly delegated authority to the Attorney General in the second clause of Subsection (d) to set forth alternative timing requirements. In the meantime, sex offenders who cannot comply with the timing requirements in Subsection (b) are sim-

Finally, petitioner relies (Pet. Br. 48-51) on SORNA's drafting history to claim that Congress delegated authority to the Attorney General to specify whether SORNA's registration requirements apply to sex offenders convicted before SORNA's enactment or implementation in a particular jurisdiction. But this argument does not prove the further point that petitioner must establish to prevail: that the delegation of power to the Attorney General to specify also automatically exempted preenactment and preimplementation offenders from the facially unqualified registration duties.

The same drafting history suggests, to the contrary, that Congress did not use the specify-the-applicability phrase to transform a facially applicable and comprehensive registration regime into a null set. As petitioner explains (Pet. Br. 50 n.25), the House version of what became Subsection (d) provided that "[t]he Attorney General *shall* prescribe rules for the registration of sex offenders convicted before the enactment of this Act or its implementation in a particular jurisdiction, and for other categories of sex offenders who are unable to comply with subsection (b)." H.R. 4472, 109th Cong., 2d Sess. § 113(d) (as passed by House Mar. 8, 2006) (em-

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ply required to initially register within a reasonable time. See *United States* v. *Dixon*, 551 F.3d 578, 585 (7th Cir. 2008) ("By analogy to contract offers that do not specify a deadline for acceptance, we can assume that they would have to register within a reasonable time."), rev'd on other grounds *sub nom. Carr*, *supra*. Significantly, petitioner is not such an offender. See p. 10, *supra* (noting that petitioner had initially registered with the State of Missouri and was convicted for failing to update his registration in Missouri and to register in Pennsylvania after moving to the State).

phasis added).[16] Had that version been enacted by Congress, petitioner would presumably agree that SORNA's registration requirements apply of their own force to all sex offenders, including those convicted before the Act's enactment or implementation in a particular jurisdiction. Subsection (a), and all the other SORNA registration provisions, would still impose a direct and unqualified obligation on all "sex offender[s]," *i.e.*, any person who "was convicted" of a qualifying sex offense; and nothing in Subsection (d) could be read as expressly or implicitly negating that clear directive. Cf. *DiTomasso*, 621 F.3d at 22 ("[B]ut for subsection (d), any argument that the section cannot operate in advance of action by the Attorney General would be absurd.").

Petitioner is thus effectively arguing that by moving from a mandatory directive ("shall") limited to prescribing "rules" for the registration of preenactment and preimplementation offenders, to a permissive delegation of authority ("shall have the authority") to "specify the applicability" of SORNA's requirements for the registration of those same offenders, Congress expressed its intent to exempt from SORNA all existing sex offenders and all new sex offenders for months and years to come—unless and until the Attorney General declares otherwise. That is a strained reading at best, and, for the reasons discussed, one that is contrary to the statutory context, structure, and purpose.

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[16] Petitioner refers to H.R. 3132, 109th Cong. § 113 (2005), but H.R. 4472 is the bill that was ultimately enacted as amended.

C. Five Courts Of Appeals Agree That Subsection (d) Does Not Exempt All Preenactment And Preimplementation Sex Offenders From SORNA's Registration Requirements

Although the circuits are divided on the issue, five courts of appeals agree that Subsection (d) does not exempt from SORNA's registration requirements all sex offenders convicted before SORNA's enactment or implementation in a particular jurisdiction.[17] Those courts, however, have generally arrived at this conclusion through a more circumscribed reading of the authority delegated to the Attorney General under Subsection (d).

In the case that controlled the panel below, the court of appeals adopted a more limited interpretation of Subsection (d). As the court explained, in *United States* v. *Shenandoah*, 595 F.3d 151 (3d Cir.), cert. denied, 130 S. Ct. 3433 (2010), it had "held that the Interim Rule affected only those sex offenders who 'did not have a registration requirement before the passage of SORNA but nonetheless were subject to sex-offender-registration requirements after SORNA became law.'"

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[17] Six courts of appeals have held to the contrary. See *United States* v. *Johnson*, 632 F.3d 912, 922-927 (5th Cir. 2011), petition for cert. pending, No. 10-10330 (filed May 3, 2011); *United States* v. *Valverde*, 628 F.3d 1159, 1163-1164 (9th Cir. 2010); *United States* v. *Cain*, 583 F.3d 408, 414-419 (6th Cir. 2009); *United States* v. *Hatcher*, 560 F. ... 222, 226-229 (4th Cir. 2009); *Dixon*, 551 F.3d at 585 (7th Cir.); *Madera*, 528 F.3d at 856-859 (11th Cir.). In *Carr*, Justice Alito's dissenting opinion indicated agreement with courts of appeals adopting that view. 130 S. Ct. at 2246 n.6. But that issue, while referenced in two footnotes in the government's brief (Gov't Br. at 10 n.4, 20 n.7, *Carr*, *supra*), was not presented in *Carr* (*id.* at 10 n.4) and the arguments in favor of reading Section 16913(a) and SORNA's other registration requirements to apply absent excepting action by the Attorney General were not developed.

J.A. 64 (quoting *Shenandoah*, 595 F.3d at 163). In *Shenandoah*, the court had concluded that "[w]hile subsections (b) and (d) when read together seem to contemplate the need for clarification as to 'initial registrations' by persons convicted of qualifying sex offenses before July 27, 2006, that need for clarification applies to [that] limited class of persons." 595 F.3d at 163. The court thus held that when a defendant "had already initially registered as a sex offender under state law when SORNA was enacted, subsection (d) of Section 16913 did not apply." *Id.* at 164. Those sex offenders, the court explained, are required to keep their registration current under Subsections (a) and (c) and can be federally prosecuted under 18 U.S.C. 2250 for failure to do so. *Ibid.*

Several other courts of appeals have adopted similar interpretations. The Eighth and Tenth Circuits have found ambiguity in Subsection (d) and have resolved that ambiguity by relying on the provision's title and the overall statutory design and purpose to read its delegation of authority as limited to currently unregistered sex offenders unable to initially register under the time frame specified in Subsection (b). See *Hinckley*, 550 F.3d at 932 (10th Cir.); *United States* v. *May*, 535 F.3d 912, 918-919 (8th Cir. 2008), cert. denied, 129 S. Ct. 2431 (2009); see also *United States* v. *Waddle*, 612 F.3d 1027, 1030-1031 (8th Cir. 2010); *United States* v. *Zuniga*, 579 F.3d 845, 850-851 (8th Cir. 2009) (per curiam), cert. denied, 130 S. Ct. 3384 (2010); *United States* v. *Lawrance*, 548 F.3d 1329, 1335-1336 (10th Cir. 2008).[18] The First Circuit reached the same result after finding the statu-

[18] Relying on the Eighth Circuit's decision in *May*, the government made a similar argument in the court of appeals. See Gov't C.A. Br. 21-22 & n.6, 44-45.

tory provision unambiguous. See *DiTomasso*, 621 F.3d at 24; see also *United States* v. *Gagnon*, 621 F.3d 30, 32-33 (1st Cir. 2010), petition for cert. pending, No. 10-8097 (filed Dec. 22, 2010).[19]

Although these courts have adopted slightly different modes of analysis, they have generally read Subsection (d) in the following manner. The second clause of Subsection (d) confers authority on the Attorney General "to prescribe rules for the registration of *any such sex offenders* and for *other* categories of sex offenders who are unable to comply with subsection (b)." 42 U.S.C. 16913(d) (emphases added). "[A]ny such sex offenders," the courts reason, refers back to the first clause and thus includes "sex offenders convicted before [SORNA's enactment] or its implementation in a particular jurisdiction." Because the second clause grants rulemaking power with respect to that category of offenders as well as "*other* categories of sex offenders who are unable to comply with subsection (b)," the courts read the delegation as limited to those preenactment and preimplementation sex offenders who are *also* "unable to comply with subsection (b)." And because Subsection (b) addresses *initial* registration, Subsection (d) does not cover preenactment and preimplementation offenders who have already initially registered as sex offenders before SORNA's enactment, as those offenders are not "unable to comply with subsection (b)." That reading is rein-

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[19] Although the First Circuit appears to read Subsection (d)'s delegation of authority in this more limited manner, *DiTomasso*, 621 F.3d at 24, it also concludes that Congress did not design a statutory scheme whereby "application of the general rules limned in Subsections (a), (b), and (c) to previously convicted sex offenders would hinge on action by the Attorney General," *id.* at 25.

forced by the title: "Initial registration of sex offenders unable to comply with subsection (b)." *Ibid.*

The Second Circuit adopted a somewhat different reading of Subsection (d), concluding that it "grants the Attorney General two separate but closely related powers: (1) the power to specify how—not whether—SORNA's registration requirements apply to the subset of sex offenders who were convicted before SORNA's enactment, and (2) the power to promulgate the precise registration rules applicable to that subset, as well as to sex offenders unable to comply" with Subsection (b) "for any other reason." See *Fuller*, 627 F.3d at 506.[20]

Whatever the precise approach, these courts of appeals generally agree that Subsection (d) cannot be construed as both encompassing *and* exempting from SORNA's registration requirements all sex offenders convicted before SORNA's enactment. The United States fully agrees with that proposition. The most straightforward path to that result, however, is to read

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[20] Some judges have relied in part on the doctrine of constitutional avoidance. See *Fuller*, 627 F.3d at 508-513 (Raggi, J., concurring); accord *Hinckley*, 550 F.3d at 948 (Gorsuch, J., concurring). They expressed reservations about the "substantial delegation concerns" that, in their view, would be raised by petitioner's interpretation. *Fuller*, 627 F.3d at 512 (Raggi, J., concurring); *Hinckley*, 550 F.3d at 948 (Gorsuch, J., concurring). The government disagrees that any such delegation would be unconstitutional, or raise a serious question in that regard. Cf. *Touby* v. *United States*, 500 U.S. 160, 165 (1991) (upholding the Attorney General's power to schedule controlled substances on a temporary basis). But it agrees with the Second Circuit that "the reasonableness" of a reading that would grant the Attorney General the power to decide in the first instance whether an entire class of individuals could become subject to criminal liability "bears on" the proper construction. *Fuller*, 627 F.3d at 504-505. As explained, attribution of that intent to Congress is unreasonable.

Subsection (d) as covering all preenactment and preimplementation offenders, but to recognize that it does not exempt those offenders from the unqualified reach of Subsection (a) and SORNA's other registration requirements.

If, however, this Court were to disagree with the latter proposition and conclude (as petitioner argues) that "authority to specify" is the equivalent of "determine in the first instance," then it would be necessary to revisit precisely what category of sex offenders Subsection (d) covers. In reading a statute, this Court does not "look merely to a particular clause," but considers "the whole statute," including its "design," "object and policy." *Dada* v. *Mukasey*, 554 U.S. 1, 16 (2008) (citations omitted). For all the reasons set forth above, it would be antithetical to Congress's clear intent to read Subsection (d) as exempting from SORNA's registration requirements all existing sex offenders and all new sex offenders for months and years to come, unless and until the Attorney General declares otherwise.

D. The Rule Of Lenity Has No Application In This Case

Despite petitioner's cursory suggestion to the contrary (Pet. Br. 18, 51 n.26), the rule of lenity has no application here. As petitioner correctly notes (*id.* at 51 n.26), the rule of lenity only applies when, "'after seizing everything from which aid can be derived,'" the Court "can make 'no more than a guess as to what Congress intended.'" *Reno* v. *Koray*, 515 U.S. 50, 65 (1995) (quoting *Smith* v. *United States*, 508 U.S. 223, 239 (1993), and *Ladner* v. *United States*, 358 U.S. 169, 178 (1958)). Resort to lenity principles is only appropriate when there is a "grievous ambiguity" in the statutory text, *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998) (cita-

tion omitted), such that "the equipoise of competing reasons cannot otherwise be resolved," *Johnson* v. *United States*, 529 U.S. 694, 713 n.13 (2000). And a statute does not have a "grievous ambiguity" simply because courts have disagreed as to its meaning. *Reno*, 515 U.S. at 64-65; *Moskal* v. *United States*, 498 U.S. 103, 108 (1990).

In light of the text, context, structure, and purposes of SORNA, there is no "grievous ambiguity" here. See *Abbott* v. *United States*, 131 S. Ct. 18, 31 n.9 (2010) (rejecting application of rule of lenity where interpretation "reflects 'an implausible reading of the congressional purpose'") (citation omitted); *Caron* v. *United States*, 524 U.S. 308, 316 (1998) (same); see also *United States* v. *Hayes*, 129 S. Ct. 1079, 1089 (2009) (rejecting application of rule of lenity after considering "text, context, purpose, and * * * drafting history"). All sex offenders, including those convicted before SORNA's enactment or implementation in a particular jurisdiction, are required to register and keep their registration current. 42 U.S.C. 16913(a). Section 16913(d), in turn, grants the Attorney General the discretionary authority to determine at some later date, if needed, that those registration requirements (or some subset thereof) should no longer be applicable to certain offenders within that broad class.

* * * * *

Because SORNA's registration requirements applied to petitioner of the statute's own force on July 27, 2006, petitioner does not stand to benefit from his challenge to the Attorney General's interim rule, and the court of appeals correctly declined to entertain that challenge.[21]

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[21] If this Court disagrees, the court of appeals will have to decide on remand whether the Attorney General's interim rule violates the APA's notice, comment, and publication requirements. If the interim rule is valid, petitioner's conviction should be affirmed because he traveled in interstate commerce and thereafter failed to register between September 16, 2007, and October 16, 2007 (J.A. 13), several months after the February 28, 2007, promulgation of the interim rule. As this Court noted in *Carr*, 130 S. Ct. at 2234 n.2, the APA question has itself given rise to a split among the courts of appeals. Compare *United States* v. *Dean*, 604 F.3d 1275, 1278-1282 (11th Cir.) (no APA violation), cert. denied, 131 S. Ct. 642 (2010), *United States* v. *Gould*, 568 F.3d 459, 469-470 (4th Cir. 2009) (same), cert. denied, 130 S. Ct. 1686 (2010), and *Dixon*, 551 F.3d at 583 (7th Cir.) (same), with *Johnson*, 632 F.3d at 920-933 (5th Cir.) (APA violation but harmless error), with *Valverde*, 628 F.3d at 1164-1168 (9th Cir.) (APA violation), and *Cain*, 583 F.3d at 419-424 (6th Cir.) (APA violation). This Court, however, only granted certiorari on the more limited question whether petitioner has standing to pursue his APA claim. And the court of appeals did not decide the merits of that claim. See Br. in Opp. 9 n.1. Although the government argued below that the interim rule is valid (Gov't C.A. Br. 45-47), and although this would provide an alternative ground for affirmance, the government does not believe the issue independently warrants this Court's review and, accordingly, has not addressed the validity of the interim rule in this brief.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 5 U.S.C. 553 provides in pertinent part:

Rule making

* * * * *

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to partici-

pate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

* * * * *

2. 18 U.S.C. 2250 provides in pertinent part:

Failure to register

(a) IN GENERAL.—Whoever—

(1) is required to register under the Sex Offender Registration and Notification Act;

(2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (in-

cluding the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or

(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;

shall be fined under this title or imprisoned not more than 10 years, or both.

(b) AFFIRMATIVE DEFENSE.—In a prosecution for a violation under subsection (a), it is an affirmative defense that—

(1) uncontrollable circumstances prevented the individual from complying;

(2) the individual did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and

(3) the individual complied as soon as such circumstances ceased to exist.

* * * * *

3. 42 U.S.C. 14071 (2006) provides in pertinent part:

Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program.

(a) In general

(1) State guidelines

The Attorney General shall establish guidelines for State programs that require—

(A) a person who is convicted of a criminal offense against a victim who is a minor or who is convicted of a sexually violent offense to register a current address for the time period specified in subparagraph (A) of subsection (b)(6) of this section; and

* * * * *

4. 42 U.S.C. 14072 (2006) provides in pertinent part:

* * * * *

FBI database

* * * * *

(i) Penalty

A person who is—

(1) required to register under paragraph (1), (2), or (3) of subsection (g) of this section and knowingly fails to comply with this section;

(2) required to register under a sexual offender registration program in the person's State of residence and knowingly fails to register in any other

State in which the person is employed, carries on a vocation, or is a student;

(3) described in section 4042(c)(4) of title 18, and knowingly fails to register in any State in which the person resides, is employed, carries on a vocation, or is a student following release from prison or sentencing to probation; or

(4) sentenced by a court martial for conduct in a category specified by the Secretary of Defense under section 115(a)(8)(C) of title I of Public Law 105-119, and knowingly fails to register in any State in which the person resides, is employed, carries on a vocation, or is a student following release from prison or sentencing to probation, shall, in the case of a first offense under this subsection, be imprisoned for not more than 1 year and, in the case of a second or subsequent offense under this subsection, be imprisoned for not more than 10 years.

5. 42 U.S.C. 16901 provides in pertinent part:

Declaration of purpose

In order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below, Congress in this chapter establishes a comprehensive national system for the registration of those offenders:

* * * * *

6. 42 U.S.C. 16911 provides:

Relevant definitions, including Amie Zyla expansion of sex offender definition and expanded inclusion of child predators

In this subchapter the following definitions apply:

(1) **Sex offender**

The term "sex offender" means an individual who was convicted of a sex offense.

(2) **Tier I sex offender**

The term "tier I sex offender" means a sex offender other than a tier II or tier III sex offender.

(3) Tier II sex offender

The term "tier II sex offender" means a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and—

(A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:

(i) sex trafficking (as described in section 1591 of title 18);

(ii) coercion and enticement (as described in section 2422(b) of title 18);

(iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a))[1] of title 18;

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[1] So in original. The second closing parenthesis probably should follow "18".

(iv) abusive sexual contact (as described in section 2244 of title 18);

(B) involves—

(i) use of a minor in a sexual performance;

(ii) solicitation of a minor to practice prostitution; or

(iii) production or distribution of child pornography; or

(C) occurs after the offender becomes a tier I sex offender.

(4) Tier III sex offender

The term "tier III sex offender" means a sex offender whose offense is punishable by imprisonment for more than 1 year and—

(A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:

(i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of title 18); or

(ii) abusive sexual contact (as described in section 2244 of title 18) against a minor who has not attained the age of 13 years;

(B) involves kidnapping of a minor (unless committed by a parent or guardian); or

(C) occurs after the offender becomes a tier II sex offender.

(5) Amie Zyla expansion of sex offense definition

(A) Generally

Except as limited by subparagraph (B) or (C), the term "sex offense" means—

(i) a criminal offense that has an element involving a sexual act or sexual contact with another;

(ii) a criminal offense that is a specified offense against a minor;

(iii) a Federal offense (including an offense prosecuted under section 1152 or 1153 of title 18) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of title 18;

(iv) a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note); or

(v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

(B) Foreign convictions

A foreign conviction is not a sex offense for the purposes of this subchapter if it was not obtained with sufficient safeguards for fundamental fairness and due process for the accused under guidelines or regulations established under section 16912 of this title.

(C) Offenses involving consensual sexual conduct

An offense involving consensual sexual conduct is not a sex offense for the purposes of this subchapter if the victim was an adult, unless the adult

was under the custodial authority of the offender at the time of the offense, or if the victim was at least 13 years old and the offender was not more than 4 years older than the victim.

(6) Criminal offense

The term "criminal offense" means a State, local, tribal, foreign, or military offense (to the extent specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note)) or other criminal offense.

(7) Expansion of definition of "specified offense against a minor" to include all offenses by child predators

The term "specified offense against a minor" means an offense against a minor that involves any of the following:

(A) An offense (unless committed by a parent or guardian) involving kidnapping.

(B) An offense (unless committed by a parent or guardian) involving false imprisonment.

(C) Solicitation to engage in sexual conduct.

(D) Use in a sexual performance.

(E) Solicitation to practice prostitution.

(F) Video voyeurism as described in section 1801 of title 18.

(G) Possession, production, or distribution of child pornography.

(H) Criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct.

(I) Any conduct that by its nature is a sex offense against a minor.

(8) Convicted as including certain juvenile adjudications

The term "convicted" or a variant thereof, used with respect to a sex offense, includes adjudicated delinquent as a juvenile for that offense, but only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse (as described in section 2241 of title 18), or was an attempt or conspiracy to commit such an offense.

(9) Sex offender registry

The term "sex offender registry" means a registry of sex offenders, and a notification program, maintained by a jurisdiction.

(10) Jurisdiction

The term "jurisdiction" means any of the following:

(A) A State.

(B) The District of Columbia.

(C) The Commonwealth of Puerto Rico.

(D) Guam.

(E) American Samoa.

(F) The Northern Mariana Islands.

(G) The United States Virgin Islands.

(H) To the extent provided and subject to the requirements of section 16927 of this title, a federally recognized Indian tribe.

(11) Student

The term "student" means an individual who enrolls in or attends an educational institution, including (whether public or private) a secondary school, trade or professional school, and institution of higher education.

(12) Employee

The term "employee" includes an individual who is self-employed or works for any other entity, whether compensated or not.

(13) Resides

The term "resides" means, with respect to an individual, the location of the individual's home or other place where the individual habitually lives.

(14) Minor

The term "minor" means an individual who has not attained the age of 18 years.

7. 42 U.S.C. 16912 provides:

Registry requirements for jurisdictions

(a) Jurisdiction to maintain a registry

Each jurisdiction shall maintain a jurisdiction-wide sex offender registry conforming to the requirements of this subchapter.

(b) Guidelines and regulations

The Attorney General shall issue guidelines and regulations to interpret and implement this subchapter.

8. 42 U.S.C. 16913 provides:

Registry requirements for sex offenders

(a) In general

A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

(b) Initial registration

The sex offender shall initially register—

(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or

(2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

(c) Keeping the registration current

A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.

(d) Initial registration of sex offenders unable to comply with subsection (b)

The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).

(e) State penalty for failure to comply

Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter.

9. 42 U.S.C. 16914 provides in pertinent part:

Information required in registration

(a) Provided by the offender

The sex offender shall provide the following information to the appropriate official for inclusion in the sex offender registry:

(1) The name of the sex offender (including any alias used by the individual).

(2) The Social Security number of the sex offender.

(3) The address of each residence at which the sex offender resides or will reside.

(4) The name and address of any place where the sex offender is an employee or will be an employee.

(5) The name and address of any place where the sex offender is a student or will be a student.

(6) The license plate number and a description of any vehicle owned or operated by the sex offender.

(7) Any other information required by the Attorney General.

* * * * *

10. 42 U.S.C. 16915 (2006 & Supp. III 2009) provides:

Duration of registration requirement

(a) Full registration period

A sex offender shall keep the registration current for the full registration period (excluding any time the sex offender is in custody or civilly committed) unless the offender is allowed a reduction under subsection (b). The full registration period is—

(1) 15 years, if the offender is a tier I sex offender;

(2) 25 years, if the offender is a tier II sex offender; and

(3) the life of the offender, if the offender is a tier III sex offender.

(b) Reduced period for clean record

(1) Clean record

The full registration period shall be reduced as described in paragraph (3) for a sex offender who main-

tains a clean record for the period described in paragraph (2) by—

(A) not being convicted of any offense for which imprisonment for more than 1 year may be imposed;

(B) not being convicted of any sex offense;

(C) successfully completing any periods of supervised release, probation, and parole; and

(D) successfully completing of[1] an appropriate sex offender treatment program certified by a jurisdiction or by the Attorney General.

(2) Period

In the case of—

(A) a tier I sex offender, the period during which the clean record shall be maintained is 10 years; and

(B) a tier III sex offender adjudicated delinquent for the offense which required registration in a sex registry under this subchapter, the period during which the clean record shall be maintained is 25 years.

(3) Reduction

In the case of—

(A) a tier I sex offender, the reduction is 5 years;

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[1] So in original. The word "of" probably should not appear.

(B) a tier III sex offender adjudicated delinquent. the reduction is from life to that period for which the clean record under paragraph (2) is maintained.

11. 42 U.S.C. 16916 provides:

Periodic in person verification

A sex offender shall appear in person, allow the jurisdiction to take a current photograph, and verify the information in each registry in which that offender is required to be registered not less frequently than—

(1) each year, if the offender is a tier I sex offender;

(2) every 6 months, if the offender is a tier II sex offender; and

(3) every 3 months, if the offender is a tier III sex offender.

12. 42 U.S.C. 16918 provides in pertinent part:

Public access to sex offender information through the Internet

(a) In general

Except as provided in this section, each jurisdiction shall make available on the Internet, in a manner that is readily accessible to all jurisdictions and to the public, all information about each sex offender in the registry. The jurisdiction shall maintain the Internet site in a manner that will permit the public to obtain relevant information for each sex offender by a single query for

any given zip code or geographic radius set by the user. The jurisdiction shall also include in the design of its Internet site all field search capabilities needed for full participation in the Dru Sjodin National Sex Offender Public Website and shall participate in that website as provided by the Attorney General.

* * * * *

13. 42 U.S.C. 16919 provides:

National Sex Offender Registry

(a) Internet

The Attorney General shall maintain a national database at the Federal Bureau of Investigation for each sex offender and any other person required to register in a jurisdiction's sex offender registry. The database shall be known as the National Sex Offender Registry.

(b) Electronic forwarding

The Attorney General shall ensure (through the National Sex Offender Registry or otherwise) that updated information about a sex offender is immediately transmitted by electronic forwarding to all relevant jurisdictions.

14. 42 U.S.C. 16924 provides:

Period for implementation by jurisdictions

(a) Deadline

Each jurisdiction shall implement this subchapter before the later of—

(1) 3 years after July 27, 2006; and

(2) 1 year after the date on which the software described in section 16923 of this title is available.

(b) Extensions

The Attorney General may authorize up to two 1-year extensions of the deadline.

REFERENCES IN TEXT

The software described in section 16923 of this title, referred to in subsec. (a)(2), became available on July 25, 2008. See Office of Justice Progs., U.S. Dep't of Justice, Annual Report to Congress 26 (Fiscal Year 2008).

15. 42 U.S.C. 16925 provides in pertinent part:

Failure of jurisdiction to comply

(a) In general

For any fiscal year after the end of the period for implementation, a jurisdiction that fails, as determined by the Attorney General, to substantially implement this subchapter shall not receive 10 percent of the funds that would otherwise be allocated for that fiscal year to the jurisdiction under subpart 1 of part E of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3750 et seq.).

* * * * *

(d) Rule of construction

The provisions of this subchapter that are cast as directions to jurisdictions or their officials constitute, in relation to States, only conditions required to avoid the reduction of Federal funding under this section.

16. Sex Offender Registration and Notification Act, 2006, Pub. L. No. 109-248, 120 Stat. 600, § 129 provides:

REPEAL OF PREDECESSOR SEX OFFENDER PROGRAM.

(a) REPEAL.—Section 170101 (42 U.S.C. 14071) and 170102 (42 U.S.C. 14072) of the Violent Crime Control and Law Enforcement Act of 1994, and section 8 of the Pam Lychner Sexual Offender Tracking and Identification Act of 1996 (42 U.S.C. 14073), are repealed.

(b) EFFECTIVE DATE.—Notwithstanding any other provision of this Act, this section shall take effect on the date of the deadline determined in accordance with section 124(a).

17. 28 C.F.R. 72.3 provides:

Applicability of the Sex Offender Registration and Notification Act.

The requirements of the Sex Offender Registration and Notification Act apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act.

Example 1. A sex offender is federally convicted of aggravated sexual abuse under 18 U.S.C. 2241 in 1990 and is released following imprisonment in 2007. The sex offender is subject to the requirements of the Sex Offender Registration and Notification Act and could be held criminally liable under 18 U.S.C. 2250 for failing to register or keep the registration current in any jurisdic-

tion in which the sex offender resides, is an employee, or is a student.

Example 2. A sex offender is convicted by a state jurisdiction in 1997 for molesting a child and is released following imprisonment in 2000. The sex offender initially registers as required, but disappears after a couple of years and does not register in any other jurisdiction. Following the enactment of the Sex Offender Registration and Notification Act, the sex offender is found to be living in another state and is arrested there. The sex offender has violated the requirement under the Sex Offender Registration and Notification Act to register in each state in which he resides, and could be held criminally liable under 18 U.S.C. 2250 for the violation because he traveled in interstate commerce.

18. 28 C.F.R. 72.3 (as promulgated by 75 Fed. Reg. 81,849 (2010)) provides in pertinent part:

Applicability of the Sex Offender Registration and Notification Act.

* * * * *

Example 2. A sex offender is convicted by a state jurisdiction in 1997 for molesting a child and is released following imprisonment in 2000. The sex offender initially registers as required, but relocates to another state in 2009 and fails to register in the new state of residence. The sex offender has violated the requirement under the Sex Offender Registration and Notification Act to register in any jurisdiction in which he resides, and could be held criminally liable under 18 U.S.C. 2250

for the violation because he traveled in interstate commerce.

REPLY BRIEF

No. 10-6549

Supreme Court, U.S.
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In The
Supreme Court of the United States

BILLY JOE REYNOLDS

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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INTRODUCTION

The text of the Sex Offender Registration and Notification Act ("SORNA") resolves the issue before the Court. The statute provides: "The Attorney General shall have the authority to specify the applicability of the requirements of [SORNA] to sex offenders convicted before enactment of this chapter or its implementation in a particular jurisdiction[.]" 42 U.S.C. § 16913(d). As the government concedes, the plain language of the statute delegates to the Attorney General the authority to decide whether or not to apply SORNA to pre-enactment sex offenders. (Gov. Br. 21.) This delegation is consonant with Congress' purpose to establish "a comprehensive national system for the registration" of sex offenders, 42 U.S.C. § 16901, and it is consistent with Congress' clear intent to implement SORNA carefully and over time.

The Attorney General exercised his authority under § 16913(d) by issuing an Interim Rule and regulations applying SORNA to pre-enactment offenders. Reading the statute as written, petitioner has a personal stake in the validity of the Interim Rule and all the regulations that make him subject to SORNA's reach. He therefore has standing to challenge the Interim Rule.

I. THE GOVERNMENT OFFERS NO VALID REASON TO REJECT THE PLAIN LANGUAGE OF THE STATUTORY TEXT.

The government agrees that an analysis of whether a sex offender is required to register under SORNA

begins with the statute, but the words "plain meaning" appear nowhere in its brief. And, although the government concedes that "[r]ead naturally . . . the first clause of Subsection (d) delegates to the Attorney General the authority to 'specify' *whether or not* SORNA's registration requirements apply to sex offenders convicted before SORNA's enactment or implementation in a particular jurisdiction" (Gov. Br. 21 (emphasis added)), it nevertheless insists that the "clear and unqualified" registration requirements set forth in 42 U.S.C. §§ 16913(a)-(c) applied to Mr. Reynolds and other pre-enactment offenders upon SORNA's enactment. (Gov. Br. 16.) The government's argument cannot be squared with the statutory text of § 16913. Not only does the express and unequivocal language of § 16913(d) demonstrate that none of the registration requirements in subsections (a)-(c) applied to Mr. Reynolds unless and until the Attorney General exercised the authority granted in subsection (d), those requirements are facially inapplicable to Mr. Reynolds.

Even under the government's alternative interpretation of subsection (d), which gives the Attorney General the power to "require some but not all" pre-enactment offenders to register under SORNA (Gov. Br. 24), Mr. Reynolds still has standing to challenge the validity of the Interim Rule because the Attorney General did exercise his authority under subsection (d) and chose to require pre-enactment offenders to comply with SORNA.

A. The Government's Reasons for Rejecting the Text of § 16913(d) Are Neither Logical Nor Convincing.

In explaining its view of SORNA's meaning, the government makes a surprising concession: "Read naturally, therefore, the first clause of Subsection (d) delegates to the Attorney General the authority to 'specify' *whether or not* SORNA's registration requirements apply to sex offenders convicted before SORNA's enactment or implementation in a particular jurisdiction." (Gov. Br. 21 (emphasis added).) Although the government contends that this statement does not "linguistically or logically" support petitioner's argument (Gov. Br. 21), it plainly does. Petitioner has argued throughout that the text of § 16913(d) directs the Attorney General to specify whether or not the registration requirements apply to pre-enactment offenders like himself. (See, e.g., Pet. Br. 23-25, 27-29, 41-48.) The Attorney General made that specification in the Interim Rule, and petitioner has standing to challenge it.

The government tries to avoid the obvious consequences of its concession by arguing that, by its terms, SORNA applied to all sex offenders, unless and until the Attorney General "specified" otherwise. (Gov. Br. 16-25.) In the government's view, subsection (d) "does not negate the broad scope of SORNA's express, unqualified registration requirements and it does not implicitly exempt any sex offenders from their reach." (Gov. Br. 20.)

Nevertheless, the government cannot escape the plain meaning of the statutory text, which delegates to the Attorney General the authority to specify the scope and timing of the applicability of SORNA with respect to pre-enactment and pre-implementation offenders – a delegation that expressly pertains to every provision of SORNA (i.e., "this subchapter"). *See* 42 U.S.C. § 16913(d). Whether Congress delegated to the Attorney General the authority to apply SORNA to a class of offenders – as Mr. Reynolds contends – or to "require some but not all to register," – as the government posits (Gov. Br. 24) – the Attorney General exercised the authority granted in subsection (d) and issued the Interim Rule and made SORNA applicable to pre-enactment offenders. Because the Attorney General could have opted not to apply SORNA to pre-enactment offenders, but chose instead to make it applicable, Mr. Reynolds has standing to challenge whether that exercise of authority was proper and whether the Attorney General's specification was valid.

In any event, Mr. Reynolds agrees that Congress did not intend § 16913(d) to implicitly or explicitly "exempt" sex offenders from registration requirements or operate as a "carve out." (Gov. Br. 21.) As the government notes, Congress provided for a "carve out" or "exemption" in other areas of SORNA. (Gov. Br. 14, 21.) This strongly suggests that Congress, understanding the difference between an exemption and a delegation of authority to act in the future, chose the

latter in drafting § 16913(d). *See Russello v. United States*, 104 S.Ct. 296, 300 (1983).

To "exempt" from is "to take out," "to free from rule or obligation which applies to others," "excuse," "release." *Webster's New World College Dictionary*, 497 (4th ed. 2001). Subsection (d) does not "take out," "excuse" or "release" offenders whose convictions precede enactment or implementation of SORNA from its requirements. Rather, subsection (d) delegates to the Attorney General – the head of the federal agency responsible for nearly all of SORNA's provisions – the authority to determine whether, when and how to apply SORNA to those offenders. Subsection (d) provides a means to apply SORNA to offenders with pre-enactment and pre-implementation convictions.[1]

Where, as here, "the statutory language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms[.]" *Carr v. United States*, 130 S.Ct. 2229, 2241-2242 (2010) (quoting *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006)). It was hardly absurd for Congress to delegate a legally problematic area to the Attorney General: such as the retroactive application of a criminal statute. (See Pet. Br. 47, n.24 (quoting *United States v. Johnson*, 632 F.3d 912 (5th Cir. 2011) ("[G]iving the Attorney General authority to determine the statute's application to pre-enactment

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[1] *Webster's New World College Dictionary*, at 69, defines "apply" as "to attach to."

offenders would allow an agency that is an expert in criminal law to negotiate the details of retroactivity and the interactions between the pre-existing state systems.").)[2]

Congress emphasized the establishment of a functioning, national system that coordinates and accommodates the mosaic of practices among jurisdictions. *See* 42 U.S.C. §§ 16901, 16912, 16919, 16923. The delegation to the Attorney General in subsection (d) is wholly consistent with Congress' goal of a comprehensive system for the registration of sex offenders, and it contributes to that system by providing a mechanism for SORNA's application to all offenders over time in a manner consistent with the future deadlines contained in SORNA's provisions. *See* 42 U.S.C. § 16924(a); SORNA, Pub. L. No. 109-248, § 129, 120 Stat. 587, 600 (2006).

The government acknowledges the obvious problems of applying subsection (b)'s initial registration

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[2] As the *Johnson* court noted, "[a]t the time of [SORNA's] enactment, Congress would have had reason to be concerned that the registration requirements fit the category of a law 'that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed.'" *Johnson*, 632 F.3d at 927 n.78 (internal citations omitted). *See also Carr*, 130 S.Ct. at 2237 n.6 (citing *Johnson v. United States*, 529 U.S. 694, 701 (2000) ("Given the well-established presumption against retroactivity and, in the criminal context, the constitutional bar on *ex post facto* laws, it cannot be the case that a statutory prohibition set forth in the present tense applies by default to acts completed before the statute's enactment.").

requirement to pre-enactment and pre-implementation offenders in light of the statutory text. (Gov. Br. 26-28 & n.12; 37 n.15.) It argues that, "[r]ecognizing this, Congress expressly delegated authority to the Attorney General in the second clause of Subsection (d) to set forth alternative timing requirements." (Gov. Br. 37 n.15.) The government's acknowledgement that, in drafting § 16913, Congress understood that compliance with plain text of subsection (b) would be an impossibility for pre-enactment or pre-implementation offenders who either have completed a sentence of imprisonment or, having not been sentenced to prison, are beyond the three business days permitted for initial registration in subsection (b)(2), further supports Mr. Reynolds' plain meaning interpretation. (Id.) Insofar as the second clause of subsection (d) reveals Congressional understanding that the precise registration requirements set forth in §§ 16913(a)-(c) were inapplicable to a certain class of offenders, *i.e.*, could not be applied to many pre-enactment and pre-implementation offenders absent alternative timing requirements, it reasonably follows that the delegation in the first clause of subsection (d) "to specify the applicability" means to determine the applicability of SORNA in the first instance.

Notably, the only action taken by the Attorney General pursuant to the authority granted in subsection (d) was the issuance of the Interim Rule, which stated, in its entirety, that "[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration

is required prior to the enactment of that Act." 72 Fed. Reg. 8894, 8896, 8897 (Feb. 28, 2007) (codified at 28 C.F.R. pt. 72) ("Interim Rule"). The summary introduction to the rule announced that "[t]he Department of Justice is publishing this interim rule to specify that the requirements of [SORNA] apply to sex offenders convicted . . . prior to the enactment of that Act." *Id.* at 8894.

As the government notes, the Attorney General thereafter issued guidelines, pursuant to the authority granted in the second clause of § 16913(d), which provide for the registration of some pre-enactment and pre-implementation offenders, *i.e.*, those "who remain in the system as prisoners, supervisees, or registrants, or who reenter the system because of a subsequent felony conviction."[3] (Gov. Br. 27-28 n.12 (citing 73 Fed. Reg. at 38,046, 38,063-38,064; 76 Fed. Reg. at 1635-36.).)

The government claims, however, that subsection (d) merely delegates "discretionary authority on the Attorney General to modify or confirm the facially applicable registration requirements," and that it "does not negate the broad scope of SORNA's express, unqualified registration requirements [or] it does not

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[3] Significantly, these guidelines call for the registration of "registrants," *i.e.*, sex offenders who already registered under state law – further proof that offenders, like Mr. Reynolds, who registered under state law prior to SORNA's enactment, had not complied with SORNA, as the government has argued. (Gov. Br. 37-38 n.15.)

implicitly exempt any sex offenders from their reach." (Gov. Br. 20.) The government's argument fails because its premise – that SORNA applied on its own terms to all sex offenders upon enactment because §§ 16913(a)-(c) are "clear and unqualified [and] do not distinguish between offenders convicted before or after" SORNA's enactment or implementation – is also flawed.[4] (Gov. Br. 16-17.)

The government is correct that subsection (d) does not negate SORNA's registration requirements. But, subsection (d) does expressly delegate to the Attorney General the authority to determine whether SORNA would apply to a certain class of sex offenders and prescribe rules for their registration – which plainly demonstrates that the requirements set forth in subsections (a)-(c) did not apply on their own terms. Indeed, if the requirements did apply on their own terms upon enactment to sex offenders with pre-enactment and pre-implementation convictions, subsection (d) would be superfluous. As it has in the past, this Court should maintain its "hesitan[cy] to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." *United States v. Jicarilla Apache Nation*, 131 S.Ct. 2313,

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[4] The government fails to explain why Congress would delegate to the Attorney General the authority to "confirm" the applicability of SORNA's registration requirements to pre-enactment offenders if the requirements "applied of their own force," as the government insists. (Gov. Br. 12.)

2330 (2011) (quoting *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988)).

Subsection (d) was necessary to ensure SORNA's application to pre-enactment and pre-implementation offenders. Although the registration requirements set forth in §§ 16913(a)-(c) are "clear and unqualified" (Gov. Br. 16), they do not apply on their own terms to Mr. Reynolds. 42 U.S.C. § 16913(d).

Subsection (a) contains the general registration rule:

> A sex offender shall register and keep the registration current in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

42 U.S.C. § 16913(a).

Although the government repeatedly cites only subsection (a) as the provision that requires sex offenders to register under SORNA (see Gov. Br. 5, 13, 16, 26, 31, 36, 45), it is subsections (b) and (c), however, that provide the specific registration requirements and define the duty to register under SORNA. It is well-settled that "a specific provision" (here subsections (b) and (c)) "controls one of more general application" (here subsection (a)). *Bloate v. United States*, 130 S.Ct. 1345, 1354 (2010) (quoting *Gozlon-Peretz v.*

United States, 498 U.S. 395, 407 (1991) (noting that "a specific provision controls one of more general application")). *See also Jicarilla Apache Nation*, 131 S.Ct. at 2330 ("When Congress provides specific statutory obligations, we will not read a 'catchall' provision to impose general obligations that would include those specifically enumerated.").[5]

Subsection (b), entitled "Initial registration," provides that a "sex offender shall initially register (1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or (2) not later than 3 business days after being sentenced for that offense, if the offender is not sentenced to a term of imprisonment." 42 U.S.C. § 16913(b). Subsection (c), entitled "Keeping *the* registration current," plainly refers back to the initial registration described in subsection (b) and requires

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[5] The government criticizes Mr. Reynolds' reliance on this rule of statutory construction in arguing that subsection (d) "controls" subsections (a)-(c) because "[s]ubsection (d) is not directed at sex offenders and it therefore does not prescribe any sex offender's registration requirements . . . [,]" (Gov. Br. 22 n.9), but this Court's iteration of the principle in *Bloate* best makes Mr. Reynolds' point: "general language of a statutory provision, although broad enough to include it will not be held to apply to a matter specifically dealt with in another part of the same enactment." *Bloate*, 130 S.Ct. at 1354 (quoting *D. Ginsburg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932)). Although subsection (a) deals generally with the registration of all sex offenders, subsection (d) deals specifically with the registration of a particular class of sex offenders and therefore controls any determination of what was required of that class of offenders.

that an offender "appear in person" in a jurisdiction "involved pursuant to subsection (a)" to report "all changes in the information" in the registry "not later than 3 business days after each change of name, residence, employment, or student status." 42 U.S.C. § 16913(c) (emphasis added).

By their terms, subsections (b) and (c) do not apply to Mr. Reynolds. Subsection (b) expressly requires an offender to initially register prior to release from imprisonment or within three days of being sentenced – neither of which Mr. Reynolds could have done following SORNA's enactment, because he was released from prison in 2005. (J.A. 15.) Insofar as subsection (c) requires an offender to keep current the initial registration described in subsection (b), subsection (c) likewise does not apply to Mr. Reynolds. Absent action by the Attorney General under the authority granted in subsection (d), the requirements in §§ 16913(a)-(c) did not and could not have been applied to Mr. Reynolds and, therefore, gave rise to no specific duty to register under SORNA.

Seeking refuge from this conclusion, the government argues that compliance with state registration laws constitutes compliance with SORNA's registration requirements. (Gov. Br. 36.) Even if this were the case – which it is not – pre-enactment compliance with state registration laws (or with the Wetterling Act), though in some instances may be sufficient to satisfy SORNA's requirements, does not give rise to a statutory duty to register under SORNA. SORNA's

registration provisions alone define the duty to register thereunder.[6]

The government relies on *United States v. Dixon*, 551 F.3d 578, 585 (7th Cir. 2008), rev'd on other grounds, *sub nom. Carr*, 130 S.Ct. 2229 (2010), for the proposition that the duty to register under SORNA for "sex offenders who cannot comply with the timing requirements in Subsection (b) [is] simply [] to

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[6] Although the government maintains that Mr. Reynolds was able to comply with SORNA's registration requirements because he registered under state law prior to SORNA's enactment (Gov. Br. 37-38 n.15), as argued in the Brief for the Petitioner, a sex offender could not have been able "to comply with subsection (b) of [§ 16913]" until § 16913(b) became the law. (Pet. Br. 36.) To adopt a construction of the phrase "unable to comply with subsection (b)" as "unable to register, prior to SORNA, in the jurisdiction where convicted," would require the Court to accept what it rejected in *Carr* – that Congress cross-referenced subsection (b) for no reason and that the precise statutory text is "merely 'a shorthand way of identifying'" offenders who could not register in their respective jurisdictions. *See Carr*, 130 S.Ct. at 2235.

SORNA does not provide that compliance with a jurisdiction's existing registry or with the Wetterling Act (42 U.S.C. §§ 14071-14072) will constitute compliance with its registration requirements. In fact, SORNA was enacted to fill perceived gaps in existing state registries by requiring, *inter alia*, the uniform collection of information about sex offenders beyond that required under the Wetterling Act. Additionally, as noted in footnote 3, *supra*, the SMART guidelines, issued pursuant to the Attorney General's authority under the second clause of subsection (d), to provide for the registration of offenders unable to comply with subsection (b), call for the registration of offenders who already had been registered under state law. *See* 73 Fed. Reg. at 38,046, 38,063-38,064; 76 Fed. Reg. at 1635-1636.

initially register within a reasonable time." (Gov. Br. 37-38 n.15.) However, "[t]here is no federal general common law." *O'Melveny & Myers v. FDIC Corp.*, 512 U.S. 79, 83 (1994) (quoting *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)). "Federal Courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision." *Milwaukee v. Ill.*, 451 U.S. 304, 312 (1981) (citing *Erie*, 304 U.S. at 78). Accordingly, the government's reliance on the *Dixon* court's "analogy to contract offers that do not specify a deadline for acceptance," and the court's assumption based thereon that sex offenders unable to comply with SORNA "would have to register within a reasonable time," *Dixon*, 551 F.3d at 585, have no proper place in determining whether the statutory duty to register under SORNA applied to Mr. Reynolds and others to whom the specific registration requirements could not be applied.

B. The Definition of "Sex Offender" in 42 U.S.C. § 16911(1) Does Not Support the Government's Interpretation of § 16913(d).

The government also relies on § 16911(1)'s definition of the term "sex offender" as "an individual who *was* convicted of a sex offense," *see* 42 U.S.C. § 16911(1) (emphasis added), to support its claim that the term "sex offender" in §§ 16913(a)-(c) expressly refers to those convicted before SORNA's enactment. (Gov. Br. 17-19.) This definition does not support the

government's interpretation of § 16913 and has little significance in determining whether SORNA applies to pre-enactment offenders without specification by the Attorney General, because all sex offenders – even those convicted *after* SORNA's enactment – are individuals whose sex offense occurred in the past. As it did in *Carr*, the government argues here that the definition of "sex offender" as someone who "was convicted of a sex offense," § 16911(1), transforms otherwise plain statutory text to produce its desired interpretation. *See Carr*, 130 S.Ct. at 2236. As the Court recognized in *Carr*, the government's argument requires "contortions" and does not comport with the statute's actual text. *Id.*

The government's illustrations from predecessor legislation do not further its argument that the use of the word "was" in SORNA's definition of sex offender means that SORNA was intended to apply to pre-enactment offenders and, in fact, support Mr. Reynolds' argument. For example, the government points out that H.R. 4472, which was passed by the House prior to SORNA's enactment, defined "sex offender" as "an individual who, *either before or after the enactment of this Act*, was convicted . . . of a sex offense." (Gov. Br. 17 n.7 (emphasis added).) However, Congress did not include the phrase emphasized above in the final version of SORNA. The deletion reflects Congress' intent to exclude those convicted before enactment of SORNA in the definition of "sex offender" from the final version of SORNA.

Likewise, the government's reference to S. 1086, another predecessor to SORNA, supports Mr. Reynolds' argument. (Gov. Br. 17 n.7.) The government also attempts to use the language of S. 1086, which defined a "covered individual" as one who "has been convicted of a covered offense[,]" together with this Court's statement in *Carr* that "numerous federal statutes use the past-perfect tense to describe one or more elements of a criminal offense when coverage of pre-enactment events is intended," to demonstrate that Congress intended SORNA to apply to offenders with pre-enactment convictions. (Gov. Br. 17 n.7 (quoting *Carr*, 130 S.Ct. at 2237).) However, the fact that Congress chose not to use the past-perfect tense in SORNA, "provides powerful evidence" that SORNA's registration requirements were prospective at enactment. *Carr*, 130 S.Ct. at 2237.

C. The Government Incorrectly Suggests That Mr. Reynolds' Interpretation of § 16913 Rests on a Negative Inference or Implication.

The government describes Mr. Reynolds' argument to be that the first clause of subsection (d) "implicitly negated" the applicability of the registration requirements set forth in §§ 16913(a)-(c) for pre-enactment offenders (Gov. Br. 19-20, 21), and argues that the Court cannot rely on a "mere negative inference . . . to establish a disposition that has no basis in the [ ] text, and that does obvious violence to the [ ] structural features." (Gov. Br. 33 (citing *Wal-Mart*

Stores, Inc. v. Dukes, 131 S.Ct. 2511, 2546 (2011) and *Corley v. United States*, 129 S.Ct. 1558, 1573 (2009)).) The rule from *Dukes* and *Corley* that the government seeks to employ simply does not apply here, because Mr. Reynolds relies on the *positive* effect of subsection (d). He does not argue that subsection (d)'s inverse transforms the meaning of subsection (a). Subsection (a) makes a general, positive pronouncement, and subsection (d), by its terms, limits the applicability of subsection (a) to pre-enactment and pre-implementation offenders.

The fact that the proper interpretation of subsection (d) has negative implications, as Justice Alito indicated in his dissenting opinion in *Carr*, 130 S.Ct. at 2246 n.6 (Alito, J., dissenting) ("[t]he clear negative implication of [the delegation in 16913(d)] is that, without such a determination by the Attorney General, the Act would not apply to those with pre-SORNA sex-offense convictions"), does not necessarily mean that the provision's language "implicitly negate[s]" the requirements of other subsections of § 16913. Indeed, as Justice Alito also stated in *Carr*, the grant of authority to the Attorney General in § 16913(d) is "SORNA's *explicit* grant of authority." *Id.* (emphasis added). "When SORNA was enacted, Congress elected not to decide for itself whether the Act's registration requirements – and thus § 2250(a)'s criminal penalties – would apply to persons who had been convicted of qualifying sex offenses before SORNA took effect. Instead, Congress delegated to the Attorney General the authority to decide that

question." *Carr*, 130 S.Ct. at 2246 (Alito, J., dissenting).

In any event, Mr. Reynolds' interpretation of § 16913 does not rely on a negative implication or inference; rather, he urges the Court to give effect to subsection (d)'s explicit and unequivocal delegation of authority to the Attorney General to determine whether to apply SORNA to pre-enactment and pre-implementation offenders. 42 U.S.C. § 16913(d).

In sum, when the statutory structure and text of § 16913 are viewed as a whole, as they must be, *see generally Davis v. Mich. Dep't of Treas.*, 489 U.S. 803, 809 (1989), it is clear that action by the Attorney General under the delegation in subsection (d) was needed to make SORNA applicable to sex offenders, like Mr. Reynolds, who were convicted prior to SORNA's enactment and who could not initially register in compliance with § 16913(b) – not only because the plain text of the first clause of subsection (d) so provides, but because the registration requirements set forth in §§ 16913(a)-(c) did not, on their own terms, apply to such offenders and, therefore, did not independently give rise to a duty to register under SORNA.

II. THE DELEGATION OF AUTHORITY TO THE ATTORNEY GENERAL TO SPECIFY THE APPLICABILITY OF ALL OF SORNA'S REQUIREMENTS TO PRE-ENACTMENT OFFENDERS SERVES THE PURPOSE OF THE STATUTE AND THE GOVERNMENT OFFERS NO REASONABLE BASIS TO REJECT THE PLAIN MEANING OF § 16913(d).

The government asks the Court to reject the plain meaning of § 16913(d) because, if petitioner's interpretation is correct, then (1) SORNA would not have been applicable upon enactment to any existing sex offenders, or to any new sex offenders prior to SORNA's implementation, until the Attorney General acted; and (2) the Attorney General could have declined to act at all, likewise leaving pre-enactment and pre-implementation offenders beyond SORNA's reach.[7] (Gov. Br. 23.) In the government's view, "it is unreasonable to think that Congress overhauled federal registration law" only to leave these offenders uncovered unless and until the Attorney General exercised the authority granted in the first clause of subsection (d). (Gov. Br. 32.) However, the purpose of, and impetus for, SORNA was to create, over time, a system that was comprehensive and national – not to

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[7] Significantly, the government's hypothetical is just that because the Attorney General did act when he issued an Interim Rule specifying SORNA's applicability to pre-enactment offenders on February 28, 2007, and issued the Final Rule effective January 28, 2011, codified at 28 C.F.R. § 72.3.

create a system that would necessarily be immediately applicable to all offenders.[8]

The government claims, however, that Congress' "primary interest" in enacting SORNA was "in locating and registering the approximately 100,000 'lost' sex offenders, all of whom were (by definition) pre-enactment offenders." (Gov. Br. 14.) Elsewhere, the government acknowledges the difficulties of registering many pre-enactment offenders under SORNA and that the steps taken by the Attorney General to date (now nearly five years since SORNA's enactment) only provide for the registration of *some* pre-enactment offenders, *i.e.*, those "who remain in the system as prisoners, supervisees, or registrants, or who reenter the system because of a subsequent felony conviction." (Gov. Br. 27-28 n.12 (citing 73 Fed. Reg. at 38,046, 38,063-38,064; 76 Fed. Reg. at 1635-36).) Under the circumstances, it would be unreasonable to adopt the government's interpretation here and ignore the statutory language of § 16913(d) simply because giving it its plain meaning would mean that SORNA could not be used upon enactment to locate

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[8] Indeed, if Congress had envisioned immediacy, it would not have provided for the Wetterling Act to remain in effect for several years after SORNA's enactment. Although implementation by each of the jurisdictions has proceeded more slowly than Congress may have anticipated, it is through the delegation in subsection (d) that the Attorney General is able to help accomplish SORNA's purpose. *See, e.g.*, 73 Fed. Reg. at 38,046, 38,063-38,064; 76 Fed. Reg. at 1635-1636.

and register the approximately 100,000 "lost" sex offenders.

The fact that the Attorney General could have declined to act at all, or could have exercised the authority granted in subsection (d) to specify that SORNA did not apply to pre-enactment and pre-implementation, also fails to provide a reasonable basis for rejecting the plain meaning of subsection (d). The government criticizes Mr. Reynolds' interpretation of § 16913(d) because it conditions criminal liability for pre-enactment and pre-implementation offenders upon action by the Attorney General. (Gov. Br. 21-23.) A significant flaw in the government's critique, however, is that its own alternative interpretation of § 16913(d) also gives the Attorney General the unfettered authority to determine the scope of SORNA's applicability and of criminal liability under SORNA:

> Under his delegated authority in Subsection (d), the Attorney General could reaffirm the statutory requirement that every sex offender convicted before SORNA's enactment or its implementation in a particular jurisdiction register; *he could require some but not all to register* (or comply with some but not all of the registration requirements); he could do nothing at all or wait several years before acting; or he could change his mind at any given time or over the course of different administrations.

(Gov. Br. 24 (emphasis added).)

As the above-emphasized language demonstrates, even under the government's interpretation of subsection (d), the Attorney General also has the power to determine the scope of SORNA's applicability for pre-enactment and pre-implementation offenders. Therefore, although the government criticizes petitioner's interpretation as an implausible expression of congressional faith in the Attorney General, its own interpretation involves a similar leap of faith *vis à vis* the Attorney General. (Gov. Br. 21-23.) Under both Mr. Reynolds' and the government's interpretation of subsection (d), the Attorney General could choose not to apply SORNA's requirements to all sex pre-enactment and pre-implementation offenders.

As noted in the Brief for the Petitioner, Congress delegated authority in subsection (d) to the Attorney General, who ultimately is responsible for SORNA's implementation and effectiveness. (See Pet. Br. 43-47; App. A, App. 1-25.) The Attorney General is also an institutional partner in law enforcement, who regularly communicates and works with Congress in developing legislation and is "the central agency for enforcement of federal laws" in order to register "all" sex offenders.[9] U.S. Dep't of Justice, *About DOJ*,

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[9] The Attorney General's Office has within it an Office of Legislative Affairs ("OLA"), which works with Congress on developing legislation and handles "Congressional affairs, including requests for information." Office of Legislative Affairs, U.S. Dep't of Justice, *Congressional Affairs*, http://www.justice.gov/open/congress.html (last visited July 24, 2011). The OLA "articulates the Department's position on legislation proposed by Congress"

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http://www.justice.gov/02organizations/about.html (last visited July 22, 2011). In sum, the Attorney General works closely with Congress in developing and ensuring the enforcement of federal criminal laws and, under the circumstances, Congress reasonably decided to delegate to the Attorney General the authority to determine whether and how SORNA would be applied to pre-enactment offenders.[10]

The government asks the Court to ignore the plain language of § 16913(d) because, it argues, Congress could not have meant what it stated in subsection (d): that the "Attorney General shall have the

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and coordinates the Department's responses to "inquiries" from members of Congress and congressional staff. *Id.* Furthermore, the OLA uses the Department of Justice's Records Management System (RMS) "to control and track all legislative requests originating within or outside the Department and to control other related items in RMS, when appropriate for internal coordination needs," including tracking pending congressional bills. *Id.*

[10] The government has difficulty understanding that, if "the Attorney General's exercise of his delegated authority would obviously lead him to apply SORNA to [pre-enactment] offenders . . . why Congress would have enacted a provision that did nothing more than delay the Act's effectiveness for the entire existing sex offender population." (Gov. Br. 32 n.14.) As explained in the Brief for the Petitioner (Pet. Br. 40), had Congress made SORNA immediately applicable to pre-enactment offenders, it risked that its "comprehensive national system for the registration of [sex offenders]," 42 U.S.C. § 16901, would be ineffective as to these offenders. Given SORNA's objectives, the risk of implementing an ineffective system far outweighed the risk that the Attorney General would decline to act or would exercise his discretion and not apply SORNA to any pre-enactment or pre-implementation offenders.

authority to specify the applicability of the requirements of [SORNA] to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction." 42 U.S.C. § 16913(d). Not only is the statutory language of SORNA's delegation to the Attorney General clear, but the delegation fits with Congress' goal to establish an effective system. The effectiveness of SORNA relies upon the Attorney General for nearly all of SORNA's implementation and administration from the day of enactment forward. (See Pet. Br. App. A; App. 1-25.)

It was not surprising, therefore, that Congress delegated to the chief law enforcement officer for the United States the responsibility for determining whether, when, and how pre-enactment and pre-implementation offenders would be subject to SORNA and, consequently, to criminal prosecution. Congress' delegation to the Attorney General is in concert with the overall purpose of SORNA to create a system of tracking and monitoring the location of sex offenders. The fulfillment of SORNA's purpose is not dependent on its immediate application to all of the approximately 500,000 sex offenders upon enactment as the government would have it.

The government misperceives Congress' goal in enacting SORNA as one that was exclusively fixated on immediacy. (Gov. Br. 19 n.8, 32, 35.) Congress aimed higher, however, envisioning a comprehensive and national system and not one that necessarily provided for the registration of all pre-enactment or

pre-implementation sex offenders upon SORNA's enactment. As this Court recognized in *Carr*, "[b]y facilitating the collection of sex offender information and its dissemination among jurisdictions, [SORNA's] provisions, not § 2250, stand at the center of Congress' effort to account for missing sex offenders." *Carr*, 130 S.Ct. at 2241. The fundamental goal of SORNA, which the delegation in subsection (d) furthers, is to provide the Attorney General with the tools to establish and administer such a system.

By delegating to the Attorney General authority regarding the applicability of SORNA to offenders convicted before enactment, Congress sought to ensure the collection and dissemination of complete and uniform information about each offender. The delegation also served to ensure flexibility in responding to unforeseen problems that might arise in light of the overlapping registration laws that already existed at the state and federal levels, and obviated the need for Congress to legislate anew as problems related to retroactive application of SORNA might arise. The ability of the Attorney General to handle such problems administratively, through regulation, allowed for flexibility and faster resolution than the legislative process would allow. Simply put, Congress did not want collateral enforcement issues to interfere with the ultimate goal of a functioning national offender registry, and the delegation of authority in subsection (d) is reasonably viewed as furthering Congress' aim.

CONCLUSION

For the foregoing reasons and those stated in the Brief For The Petitioner, the Court should reverse the decision of the Court of Appeals for the Third Circuit and remand for consideration of the merits of Mr. Reynolds' challenge to the validity of the Attorney General's Interim Rule.[11]

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[11] If the Court is inclined to follow the government's suggestion to affirm on any basis, including that the Interim Rule was validly issued (Gov. Br. 46 n.21), Mr. Reynolds respectfully requests that he be permitted to file a supplemental brief specifically addressing the rule's validity.